

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 394.

**H. SNOWDEN MARSHALL, AS RECEIVER OF ALL PACK-
AGE GROCERY STORES COMPANY, PETITIONER,**

vs.

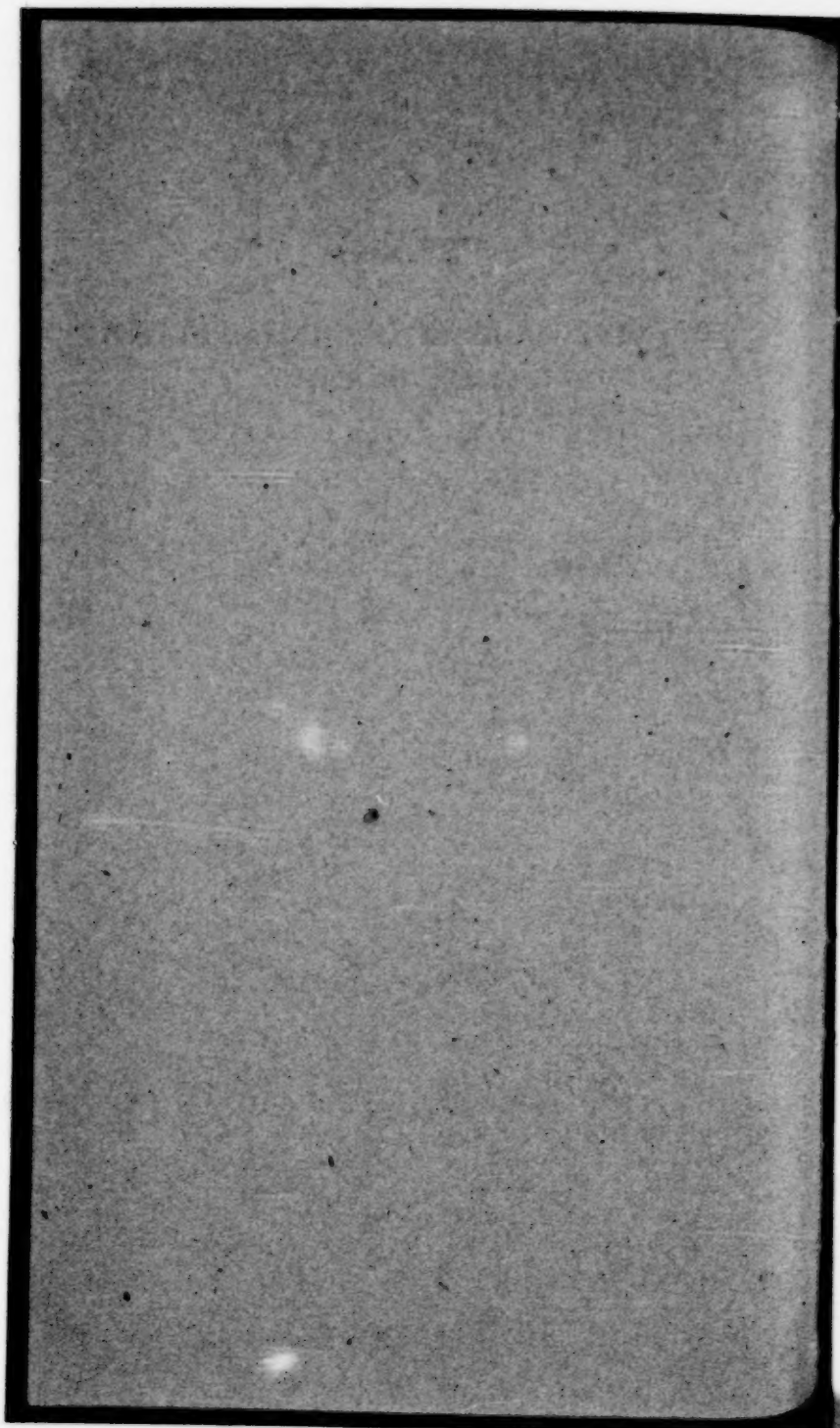
THE PEOPLE OF THE STATE OF NEW YORK.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.**

PETITION FOR CERTIORARI FILED MARCH 27, 1921.

CERTIORARI AND RETURN FILED JUNE 1, 1921.

(37,591)



(27,591)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 294.

H. SNOWDEN MARSHALL, AS RECEIVER OF ALL PACK-
AGE GROCERY STORES COMPANY, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Transcript of record from the district court of the United States for the southern district of New York.....	1	1
Citation	1	1
Admission of service of citation.....	2	2
Stipulation as to security, &c.....	3	2
Notice of appeal.....	4	3
Allowance of appeal.....	5	3
Assignment of errors.....	6	4
Notice of motion to file claims.....	8	5
Petition	10	6
Stipulation as to date of hearing of motion.....	15	8
Reply	15	8

	Original.	Print.
Stipulation as to submission of affidavit.....	21	12
Supplemental affidavit of petitioner.....	22	12
Order resettling order.....	25	14
Opinion, Hand, J.....	29	15
Stipulation as to record.....	34	18
Certificate of clerk.....	35	19
Opinion, Ward, J.....	36	19
Opinion, Hough, J., dissenting.....	42	23
Judgment	45	24
Petition for rehearing.....	46	24
Order denying petition for rehearing.....	49	26
Clerk's certificate.....	50	26
Writ of certiorari and return.....	51	27

a United States Circuit Court of Appeals, Second Circuit.

WILLIAM H. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of THE PEOPLE OF THE STATE OF NEW YORK, Petitioners.

Record on Appeal.

Charles D. Newton, Attorney-General of the State of New York,
Solicitor for Petitioners, Capitol, Albany, New York.

Gilbert & Gilbert, Solicitors for Respondent, No. 43 Exchange
Place, Borough of Manhattan, New York City.

[Stamped:] United States Circuit Court of Appeals, Second Cir-
cuit. Filed Jul. 1, 1919. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

WILLIAM H. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of THE PEOPLE OF THE STATE OF NEW YORK, Petitioners.

Citation.

Greeting:

Whereas the People of the State of New York have lately appealed to the United States Circuit Court of Appeals for the Second Circuit from a decree or order rendered in the United States District Court for the Southern District of New York, dated May 3d, 1919 and entered in the office of the Clerk of said Court on the 7th day of May, 1919, which said order resettled and amended the order made and entered on the 12th day of April, 1919, and which said decree or order adjudicates respecting the claims of the People of the State of New York for taxes and from which order an appeal is taken from that portion thereof ordering that the claims of the People of the State of New York for \$977.86 and \$22,517.86, respectively, for license fees for the purpose of exercising corporate franchise and carrying on business within the State of New York be allowed only as general claims against the estate of the defendant company in the hands of the receiver thereof; you are hereby cited to appear before the United States Circuit Court of Appeals for

the Second Circuit at the Post Office Building in the Borough of Manhattan, City of New York on the 31st day of May, 1919, to do and receive what may appertain to justice in the premises and to show cause why said order or decree of the United States District Court for the Southern District of New York in said appeal mentioned should not be reversed, modified or corrected in allowing said claims as preferred claims against the estate of the defendant in the hands of the receiver thereof, and directing the receiver to forthwith pay to the People of the State of New York the said sums of \$977.86 and \$22,517.86 in satisfaction thereof.

Given under my hand at the Borough of Manhattan in the City of New York, in the Southern District of New York, Second Circuit, this 8th day of May in the year of our Lord, One thousand, nine hundred and nineteen, and of the Independence of the United States, One Hundred and Forty-third.

J. M. MAYER,

*United States District Court Judge
for the Southern District of New York.*

Admission of Service of Citation.

Service of a copy of within citation is admitted this 10th day of May, 1919.

GILBERT & GILBERT,

Solicitors for Defendant.

3

Stipulation.

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of THE PEOPLE OF THE STATE OF NEW YORK, Petitioners.

It is hereby stipulated and agreed that the giving of security by the appellant, The People of the State of New York, pursuant to the provisions of Section 1000 of the Revised Statutes of the United States on an appeal from the order made and dated the 3d day of May, 1919 and duly entered in the office of the Clerk of this Court on the 7th day of May, 1919, which said order resettled and amended an order made and entered in the office of the Clerk of this Court on the 12th day of April, 1919 in this cause be and the same hereby is waived, and that the citation herein may be signed by a Justice of this Court without the requirement of such security.

Dated New York, May 8th, 1919.

GILBERT & GILBERT,

Solicitors for Appellees.

So ordered May 8, 1919

J. M. MAYER,

U. S. D. J.

4

Notice of Appeal.

United States District Court, Southern District of New York.

In Equity. E. 14389.

WILLIAM H. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of THE PEOPLE OF THE STATE OF NEW YORK, Petitioners.

The above named petitioners being aggrieved by the order dated May 3d, 1919 and entered in the office of the Clerk of this Court on the 7th day of May, 1919, which said order resettled and amended the order made and entered in the office of the Clerk of this Court on the 12th day of April, 1919, in this cause, do hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of said order which provides that the claims of the People of the State of New York for \$977.86 and \$22,517.86, respectively, for license fees for the privilege of exercising corporate franchise and carrying on business within the State of New York, be allowed only as general claims against the estate of the defendant company in the hands of the receiver thereof and which disallows preference in payment of said claims, for the reasons specified in the assignment of errors which is filed herewith; and the petitioner prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

New York, May 8th, 1919.

CHARLES D. NEWTON,

*Attorney General of the State of New York,
Solicitor for Petitioners.*

Office and Post Office Address, Capitol, Albany, New York.

Allowance of Appeal.

The foregoing claim of appeal is hereby allowed.
New York, May 8, 1919.

J. M. MAYER,

United States District Court Judge.

Assignment of Errors.

United States District Court, Southern District of New York.

WILLIAM H. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of THE PEOPLE OF THE STATE OF NEW YORK, Petitioners.

Now comes the petitioner the People of the State of New York, by Charles D. Newton, their solicitor, Attorney General of the State of New York, and says that the order of the United States District Court for the Southern District of New York, dated May 3d, 1919, duly filed and entered herein in the office of the Clerk of said Court on the 7th day of May, 1919, resettling the order of this Court duly filed and entered herein in the office of the Clerk of this Court on the 12th day of April, 1919, and adjudicating upon the claims of the People of the State of New York for taxes, is erroneous and contrary to the just rights of the petitioners in the following particulars, to wit:

7 First. The District Court of the United States for the Southern District of New York erred in holding that the claims of the People of the State of New York for \$977.86 and \$22,517.86, respectively, for license fees for the privilege of exercising corporate franchise and carrying on business within the State of New York, were only general claims against the estate of the defendant All Package Grocery Stores Company in the hands of the said receiver, whereas said claims should have been held and allowed as preferred claims against the estate of said defendant in the hands of said receiver, and the said receiver should have been directed and authorized to forthwith pay to the People of the State of New York the said sums of \$977.86 and \$22,517.86 in satisfaction thereof.

Second. That the decree and order of the said District Court of the United States for the Southern District of New York, as above pointed out, in not holding that said claims were preferred claims, is contrary to the law of the land and the evidence in this cause.

In order that the foregoing assignments of error may be made a part of the record, the said petitioners, the People of the State of New York, present the same to the Court and pray such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided, and that a reversal of so much of said order as is appealed from and against which

error is assigned, as hereinbefore stated, may be made and entered by the Court.

New York, May 8th, 1919.

CHARLES D. NEWTON,
Attorney General of the State of New York,
Solicitor for the Petitioners.

Office and Post Office Address, Capitol, Albany, New York.

8

Notice of Motion.

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,
against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

SIRS:

Please take notice, that on the annexed petition of Robert S. Conklin, verified November 21st, 1918, and on all proceedings heretofore had herein, the undersigned will move this Court at a term thereof, to be held in Room 235, in the Post Office Building, City and County of New York, on the 14th day of December, 1918, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order authorizing and permitting the People of the State of New York to file with the receiver herein the claims enumerated and set forth in the petition and authorizing and directing the receiver to receive and file said claims and for such other and further relief as to the Court may seem just and proper.

9
Dated New York, December 21, 1918.
Yours, &c.,

MERTON E. LEWIS,
Attorney General of the State of New York.

Office & P. O. Address, State Capitol, Albany, N. Y.

To Gilbert & Gilbert, Esqs., Attorneys for Receiver, 43 Exchange Place, New York City.

10

Petition.

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

The petition of Robert S. Conklin respectfully shows to this Court:

First. That he is a Deputy Attorney General of the State of New York and at all times hereinafter mentioned has been and still is attached to the New York City Bureau of the Attorney General and in charge of the interests of the State of New York in the above entitled action.

Second. That as deponent is informed and believes, said action is an equity action pending in this Court and that in the course of said action receivers have been appointed and H. Snowden Marshall is now the sole receiver therein and is in possession of and entitled to all property of said corporation and is conducting certain proceedings with a view towards distribution of said assets among creditors.

Third. That by an order heretofore entered herein, the time for creditors and claimants to file their claims with the receiver expired on February 28, 1918.

Fourth. That the People of the State of New York, as deponent has been informed and believes, have claims against said corporation as follows:

"For license fee or tax for the privilege of exercising its corporate franchises or carrying on business based on \$18,014,285, being the amount of capital stock employed in New York State Pursuant to Section 181, Chapter 60 of the Consolidated Laws of the State of New York, \$22,517.86.

For tax on franchise or business based on capital stock employed in New York State during the year ending Oct. 31, 1915 (assessment \$346,262)	\$259.70
For tax on franchise or business based on capital stock employed in New York State during the year ending Oct. 31, 1916 (assessment \$589,319)	441.99
Interest and penalty	141.80
Total	<u>\$843.58</u>

For license fee or taxes stated against corporation known as All Package Grocery Stores Company, predecessor corporation, the assets of which were taken over by the defendant herein, for the privilege of exercising its corporate franchises or carrying on business within the State of New York based on capital stock of \$782,280
 12 employed in the State of New York, pursuant to Section 181, Chapter 60 of the Consolidated Laws as amended\$977.86"

That said taxes accrued and became a lien on all of the property of the defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of the receiver herein.

Fifth. That prior to the time fixed for the filing of claims herein, the State of New York had presented a bill for the first amount specified herein, that is, \$22,517.86 and said bill was recognized as a claim and objections to the same have been filed by the receiver and the matter has now been brought on before the Special Master appointed herein, Robert L. Harrison, Esq., for a hearing.

Sixth. That heretofore and on or about September 6th, 1918, deponent presented to the receiver herein formal claims properly set forth and properly verified for the several items hereinbefore enumerated. That said claims have not been returned by said receiver, but deponent has received from the attorneys for said receiver notice in the form of a letter that since the time to file claims had expired, the claim of the People of the State of New York for the amounts of \$843.58 and \$977.86 could not be received by the receiver.

Seventh. That it is the contention of deponent that since the claims of the People of the State of New York are for taxes, no formal notice or proof of claim is necessary, but that the receiver is obliged to recognize said claims and to recognize the lien of the

13 People of the State of New York on all of the property of said corporation. That deponent does not desire, however, to be foreclosed from having said claims received, filed and recognized by any technical objection thereto and therefore asks that an order may be made herein permitting the filing of said claims as hereinbefore enumerated and directing the receiver to receive and recognize said claims the same as if they had been presented before the expiration of the time for filing claims, reserving, of course, to the receiver any right to which he may properly be entitled to file objections to said claims and to bring said objections before the Special Master for a hearing thereon.

ROBERT S. CONKLIN,
Deputy Attorney General,
Petitioner.

14 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Robert S. Conklin, being duly sworn, deposes and says:
That he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

ROBERT S. CONKLIN.

Sworn to before me this 22nd day of November, 1918.

ALFRED W. JONES,
Commissioner of Deeds,
City of New York.

Certificates filed New York (Clk. 57, Reg. 19020), Kings (Clk. 48a, Reg. 9015), Bronx (Clk. 6), Queens 3407 and Richmond.
My Commission expires June 12, 1919.

15

Stipulation.

It is hereby stipulated that the within motion may be heard before Mr. Justice Augustus Hand at his Chambers at No. 233 Broadway, Borough of Manhattan, City of New York, on the 11th day of December, 1918, at 5 o'clock P. M.

Dated Dec. 11/18.

MERTEN E. LEWIS,
Attorney General.
GILBERT & GILBERT,
Attorneys for Receiver.

Reply.

United States District Court Southern District of New York.

In Equity. No. E-14-389.

WILLIAM L. SWEET, JR., Complainant,
against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

Now comes H. Snowden Marshall, Receiver of the above named defendant company, and for a reply to the supplemental affidavit of Robert S. Conklin verified December 23rd, 1918, and submitted to the Court on January 24th, 1919:

The said affidavit states that the original application of the At-

16 torney General was based "on all proceedings heretofore had herein" and then Mr. Conklin refers to summary proceedings had herein. The first of these proceedings to which he directs attention is the first order limiting the time of creditors to file claims and he states that the proof of the mailing of a copy of the order "shows that no copy of the order was ever mailed to the State of New York or any representative thereof." No reference is made by him to the second order extending the time of creditors to file claims, and the inference to be drawn from his affidavit is that neither the State of New York nor any of its representatives had any notice of the proceedings. It is significant that he does not submit any affidavit from the State Comptroller or any one in the State Comptroller's office. The fact is as I am advised, that as long ago as the latter part of December, 1917, or the early part of January, 1918, the matter of the plaintiff's claim for a license fee was specifically brought to the attention of the State Comptroller and he then stated that the claim would be prosecuted by the Attorney General's office. But as appears by the Attorney General's petition herein, no move was made by the State Comptroller or the Attorney General to prosecute the claims in question until the month of September, 1918. It is quite true that the State Comptroller rendered bills to the Company for a license fee but it also appears from the Attorney General's petition that the Receiver rejected such claim and the notice of objection is broad enough to cover any objection which may be raised to the form or substance of the claim.

The affidavit of Mr. Conklin also points out that the various reports filed by the Receivers beginning with the first report made December 31st, 1917, show that the license tax due the State of New

17 York was carried on the books of the Receivers and on the accounts of the Receivers as a liability in the amount of \$22,517.86. The fact is that the reports referred to were the reports of the public accountants who simply found that the old company had posted up in its accounts payable ledger the bill of the State of New York. But in none of the reports of the Receivers is this claim admitted as a valid claim against the receivership estate.

Mr. Conklin further states that the various reports filed by the Receivers show an excess of assets over liabilities of from \$250,000 to \$500,000. Mr. Conklin fails to point out that these same reports show that liabilities in question were nearly \$200,000 and that the company never, in its entire existence, had any property which would justify any such capitalization of \$25,000,000 upon which capitalization the license fee in question is based.

Mr. Conklin also points out that the property was sold in June, 1918, for over \$210,000. That was approximately the amount of the consideration, but as against that there was approximately \$160,000 in Receivers' obligations, to say nothing of the claims of general creditors. Moreover the sale for \$210,000 included the good will and trade name of the Company in the State of New York, and as a part of the transaction the Company's right to do business in the

State of New York was surrendered and the surrender accepted by the State of New York which thereupon granted a charter to a New York corporation of the same name. The tangible assets so sold also included a great quantity of merchandise which had been purchased by the Receivers. The amount realized is a fair indication of the amount of capital employed by the defendant company in the State of New York.

Mr. Conklin states that the Receivers recognized a claim against the United States for taxes submitted in the form of a bill without any sworn statement, and that the Receivers paid the same as a preferred claim under an order of the Court entered on December 27th, 1917. The claim in question was one which was actually due the United States and it was properly paid at the time in order to prevent the accrual of a penalty for failure to pay the same.

Mr. Conklin also states that on June 4th, 1918, Judge Mayer made an order authorizing one Meyer Sukenick to file a claim *nunc pro tunc*. The fact is that Sukenick had previously commenced an action against the Company and he was allowed to prosecute the action to judgment, which he could not do before the expiration to file claims, and was subsequently allowed to file a claim for the amount of judgment. The amount in question was \$102. There is no analogy whatever between the two matters last referred to and the claim of the State of New York.

Throughout the affidavit of Mr. Conklin the license fee is referred to as a license tax. In the petition of the Attorney General for leave to file claims *nunc pro tunc*, the license fee is referred to as a license fee or tax, and the statement is therein made that "said taxes became a lien on the property of the defendant company before the appointment of the Receivers." As pointed out in the brief of Receivers' counsel, the license fee is not a tax. Moreover, under no circumstances, does the license fee become a lien on the property of a corporation until a warrant therefor is issued to the Sheriff and he makes an actual levy upon the property of the corporation. This is expressly provided for by Section 201 of the New York State Tax Law and no warrant ever having been issued against the property of the defendant corporation, it is submitted that no lien against such property in favor of the State was created notwithstanding the statements in the Attorney General's petition to the contrary.

As shown by the brief submitted by the Receivers' counsel, it is quite obvious that the following claims are not "taxes:"

License fee	\$22,517.86
Interest and penalty	141.89
License fee of predecessor corporation ..	977.86

but that they are claims in the nature of debts and that formal proofs of claim should be submitted in support thereof. The Attorney-General recognizes this fact by submitting formal proofs of claim and then moving for leave to file such claims *nunc pro tunc*, and he now asks in a supplemental affidavit that this Court make a final

disposition of the matter without referring it to the Special Master. In the opinion of the Receiver, it would be advisable to have the Court make an immediate disposition of the entire matter. The hearings on the claims referred to the Special Master have now dragged on for several months owing to the delay of the Attorney General in this matter, and justice to the creditors requires that the estate should be wound up with all possible speed. In the opinion of the Receiver, justice also requires that the State of New York, having so long delayed the prosecution of its claim, should not be permitted, so far as its claim for license fee and penalty is concerned, to come in on the same footing with creditors who parted with merchandise and money and other valuable consideration.

The Attorney General having sought the favor of a court of equity, should be willing to do equity. An equitable disposition of the matter would seem to be to allow the two claims of the State of New York for franchise tax for the years 1915 and 1916, amounting in the aggregate to the sum of \$701.69, as preferred claims and directing the Receiver to pay the same. As to the claims for license fee, it should be allowed as a general claim without preference at the sum of \$977.86; or, in the alternative, allowed at the sum of \$22,517.86 and subordinated to the claims of the general creditors. In regard to the item of \$977.86, this is the license fee based on the amount of capital employed in the State of New York by the All Package Grocery Stores Company of New Jersey, the predecessor of the defendant company and represents a maximum value of capital employed by its successor company, the defendant herein in this State.

Dated New York, January 27th, 1919.

H. SNOWDEN MARSHALL,

Receiver.

CITY AND COUNTY OF NEW YORK, ss.:

H. Snowden Marshall, being duly sworn, does hereby make solemn oath that he is the Receiver mentioned in the foregoing answer; that the statements therein contained are true to the best of his knowledge, information and belief.

H. SNOWDEN MARSHALL.

Sworn to before me this 28th day of January, 1919.

[SEAL.]

MAX ROCKMORE,
Notary Public, Kings Co.

Certificate filed New York County.

12 H. SNOWDEN MARSHALL VS. PEOPLE OF NEW YORK.

21 *Stipulation.*

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the petitioner and the attorneys for the receiver that this affidavit may be submitted on the pending motion herein as part of the motion papers.

Dated December 23rd, 1918.

MERTON E. LEWIS,

Attorney General, State of New York,

Attorney for Petitioner.

— — —

Attorneys for Receiver.

22 *Supplemental Affidavit of Petitioner on Behalf of the State of New York.*

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

STATE OF NEW YORK,

City of New York,

County of New York, ss:

Robert S. Conklin, being duly sworn, says: That he is a Deputy Attorney-General attached to the New York City Bureau of the Attorney-General of the State of New York. That he has verified the petition herein on which there is pending an application of the State of New York to file certain claims for taxes with the receiver herein. That it was stated in the notice of motion herein that said application was also based "on all proceedings heretofore had herein." That in order to call to the attention of the Court on this motion certain of the proceedings that have direct relation to the question now presented, deponent submits this further affidavit.

That this action was begun about December 1st, 1917, and the receiver herein was appointed by an order made and filed about December 4th, 1917. That on or about December 10th, 1917, an order was made and filed herein requiring all creditors and claimants to file written and verified claims on or before Jan-

23

uary 15th, 1918. That said order directed the publication of the same and that a copy thereof be mailed to all creditors and claimants whose names appeared on the books of the corporation. That by an order made and filed on or about February 13th, 1918, the time in which to file the said claims was extended to February 28th, 1918. That the proof of the mailing of a copy of the order to creditors as directed by the Court filed with the receiver's report No. 3 on February 5th, 1918, shows that no copy of the order was ever mailed to the State of New York or to any representative thereof. That the various reports filed by the receiver beginning with the first report made December 31st, 1917, show that the license tax due to the State of New York was carried both on the books of the company and in the accounts of the receiver as a liability in the sum of \$22,517.86. That the preferred capital stock of this corporation amounts to \$5,000,000 and the common stock to \$20,000,000. That the tax of the State of New York was based on the proportionate amount of the capital stock employed within the State of New York. That the complainant herein, William L. Sweet, Jr., also appears to be the chief creditor as he made a loan to this Company of about \$100,000 and received as security therefor preferred stock of the par value of \$3,000,000.

That the various reports filed by the receiver herein showed an excess of assets over liabilities of from \$250,000 to \$500,000. That the sale of the property of the corporation, as shown by the receiver's report filed June 18th, 1918, was for over \$210,000. That the receiver herein recognized a claim of the United States for a tax on the capital stock, although the same was submitted as was the claim of the State of New York in the form of a bill without any sworn statement relative thereto. That the receiver applied to the Court for an order authorizing the payment of this amount as a preferred claim and secured an order made and filed December 27th, 1917, granting the relief asked for.

That on or about June 4th, 1918, an order was made by Mr. Justice Mayer of this Court authorizing one Meyer Shuckeneck, who had not theretofore filed his claim, to file said claim nunc pro tunc as of February 28th, 1918.

In addition to the relief asked for in the petition, deponent asks that the court, if it decides that no sworn proof of claim need be filed herein, direct the receivers to pay the claims of the State of New York out of the funds now in their possession as preferred claims.

ROBERT S. CONKLIN.

Sworn to before me this 23rd day of December, 1918.

ABRAHAM J. LIPSHITZ,

Commissioner of Deeds, City of New York.

Certificate filed in County Clerk's Office of New York No. 243, Bronx No. 31, Queens No. 3552, Kings No. 136 and Richmond.

Cert. filed in Reg. Off. of New York Co. No. 12895, Bronx Co. No. 9029, and Kings Co. No. 5084.

My Commission expires November 20, 1919.

Order Resettling Order.

United States District Court, Southern District of New York.

In Equity. E-14-389.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

An application having been made to resettle and amend the order of this Court dated and entered April 12, 1919,

Now, upon reading and filing the affidavit of Robert P. Beyer, Deputy Attorney General of the State of New York, verified April 30, 1919, the notice of motion herein dated April 30, 1919, and due proof of the service of said affidavit and notice of motion upon the attorneys for the receiver herein, all in support of said application and after hearing Robert P. Beyer, Deputy Attorney General of the State of New York, in support of said application, there being no opposition thereto, it is

Ordered, that the order of this Court dated the 12th day of April, 1919, and duly entered in the office of the Clerk thereof on said 12th day of April, 1919, be and the same hereby is resettled and amended so as to read as follows:

United States District Court, Southern District of New York.

In Equity. E-14-389.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

A motion having heretofore been made herein on behalf of the People of the State of New York for leave to file with H. Snowden Marshall, as Receiver of the above named defendant, certain claims for license fees and franchise taxes and said motion having been duly brought on to be heard before me and argument having been had thereon and Robert S. Conklin, Esq., Deputy Attorney-General of the State of New York, appearing in support thereof, and Francis Gilbert, Esq., of counsel for the Receiver, and Stetson, Jennings & Russell, solicitors for the complainant, appearing in opposition thereto.

Now on the petition of Robert S. Conklin, verified November 22d, 1918, and the notice of motion dated November 21st, 1918, and on the stipulation that the motion may be heard before Judge Augustus N. Hand, dated December 17th, 1918, and on proof of service of said

papers on the attorneys for the Receiver and on the affidavit of Robert S. Conklin, sworn to December 23rd, 1918, and on the reply of H. Snowden Marshall dated January 27, 1919, and on motion, it is

27 Ordered that H. Snowden Marshall, as Receiver of the defendant be and he hereby is authorized and directed to receive and file the claims and proof of claims of the People of the State of New York the same as if they had been presented before the expiration of the time for filing claims as follows:

A claim against the above named defendant for taxes on franchise or business based on capital employed in the State of New York during the year ending October 31st, 1916, amounting to \$441.99.

A tax on franchise or business based on the amount of capital stock employed in the State of New York by the All Package Grocery Stores Company, a New Jersey corporation, and the predecessor to defendant, during the year ending October 31st, 1915, amounting to \$259.70.

Interest and penalty on above a % franchise taxes amounting to \$141.89.

For license fees or tax heretofore stated against the All Package Grocery Stores Company, a New Jersey corporation, the predecessor of defendant, for the privilege of exercising its corporate franchises and carrying on business within the State of New York based on the amount of capital stock employed in New York State \$977.86.

For license fee or tax heretofore stated against the defendant for the privilege of exercising its corporate franchises or carrying on business within the State of New York, \$22,517.86; and it is

Further ordered that the said claims of the People of the State of New York for the sums of \$259.70 for tax on franchises for the year ending October 31st, 1915, and \$441.99 for tax on franchises for the year ending October 31st, 1916, and for \$141.89 interest and penalty,

28 amounting in the aggregate to the sum of \$843.58 be and the same hereby are allowed as preferred claims against the estate of the defendant in the hands of the said Receiver and the said Receiver is hereby authorized and directed forthwith to pay to the People of the State of New York the said sum of \$843.38 in satisfaction of its said claims, and it is

Further ordered that the said claims of the People of the State of New York for \$977.86 and \$22,517.86, respectively, for license fees for the privilege of exercising corporate franchise and carrying on business within the State of New York be allowed as general claims against the estate of the defendant company in the hands of said Receiver.

Dated May 3, 1919.

AUGUSTUS N. HAND,
United States District Court Judge.

United States District Court, Southern District of New York.

#445.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

Merton E. Lewis, Attorney General of the State of New York (Robert S. Conklin, Deputy Attorney General, of Counsel), for People of the State of New York.

Gilbert & Gilbert, for H. Snowden Marshall, Receiver.

AUGUSTUS N. HAND, *District Judge:*

This is an application by the State of New York for leave to file and prove claims for taxes. On December 18th, 1917, an order was made requiring all creditors to file verified claims on or before January 15, 1918, and directing the publication of the order and the mailing of a copy to all creditors whose names appeared on the books of the corporation. The order was published but was not mailed to any State official. I do not have any reason to believe that the State had any actual notice of the order though its officials had some communication with the receivers as to the payment of the taxes. I

see no justification under these circumstances in requiring the State to make any terms as a condition of proving its claim for taxes. I, therefore, grant the application. As for the extent to which the claim will be allowed, it is the law of the courts of the State of New York that a tax or any other indebtedness to that State is entitled to payment prior to all claims not based upon a specific lien.

Central Trust Co. vs. Third Ave. Ry. Co., 186 Fed., 291.

Wise vs. Wise Co., 153 N. Y., 507.

Matter of Carnegie Trust Co., 206 N. Y., 390.

This is not, I think, a law of property, but a rule of administration or procedure in the Courts of New York as well as of England and many of our states based upon the power of the Court of a sovereign to administer in the interest of the latter assets over which it has control. If the State has a statute imposing a lien for the tax or even directing prior payment that will control as does the bankruptcy and other statutes in the case of the United States Guarantee Title & Trust Co. vs. Title Guaranty & Surety Co., 224 U. S., 152. But in the absence of a statute, I can see no reason why a United States Court should grant any priority to a State over other creditors in administering a fund which it has seized and is administering in a suit by a creditor where jurisdiction is based on diverse citizenship.

It is much the same as though a New York Court was passing on the claim to priority of payment from assets in its custody of a tax due the State of California. That State would I apprehend in the absence of a lien be treated as a general creditor. Of course a different rule obtains in bankruptcy when the act gives priority to taxes.

31 Where under the State law the claim of the State is not construed as a tax, the bankruptcy Courts grant no priority because of the fact that the debt is to a sovereign.

In re Ott, 95 Fed., 274.

In re Wyoming Valley Ice Co., 145 Fed., 267.

Commonwealth vs. York Silk Mfg. Co., 192 Fed., 81.

Judge Ward held in the case of Robinson vs. Mutual Reserve Life Ins. Co., 175 Fed., 624, that the State was entitled to no preference in the payment of taxes where a lien had not attached. It is true that he cited as authority for this the case of Wise vs. Wise Co., 153 N. Y., 507, and that in the latter case the question involved was whether the tax, which had not become a lien, should be paid prior to a mortgage. It was held in the case of Cook County National Bank vs. United States, 107 U. S., 445, that the United States was not entitled to priority against an insolvent National Bank. The last case seems to indicate that the right to priority is not a necessary attribute of national sovereignty but depends upon procedure of the particular Court administering the fund.

There are four items of taxes involved in this application. The defendant corporation was the successor to the assets and liabilities of a New Jersey corporation capitalized at \$1,000,000. That New Jersey corporation became indebted to the State of New York for a "license fee" of \$997.86, imposed for the right to come into the State to do business, and the further annual franchise tax for the year 1915 of \$259.70. The defendant corporation organized under the laws of Delaware with a capital stock of \$25,000,000. The

32 State of New York has a claim against this corporation for a license fee amounting to \$22,517.86, and for an annual franchise tax for the year 1916 of \$441.99. On the two franchise taxes there is accrued interest with a penalty amounting to \$141.89. Sec. 197 of the Tax Law of the State of New York provides that the annual franchise tax imposed by Sec. 182 of the same law shall "be a lien upon and bind all the real and personal property of the corporation." This statute renders the annual franchise tax of the New Jersey corporation, the assets of which passed to the defendant Delaware corporation, and the annual franchise tax of the latter, plainly a lien upon the property in the custody of the Court and covers the interest and penalty as well. The Receiver should therefore pay to the State of New York, in satisfaction of its lien, the sums of $\$259.70 + \$441.99 + \$141.89 = \843.58 . The license fees of \$997.86 and \$22,517.86 may be proved as general claims. The receiver has argued that such claims are not for taxes, but in no case supports this contention. In the case of New Jersey vs. Anderson, 203 U. S., 483, while the

annual franchise tax, and not the organization tax, was involved in the discussion, the New Jersey Statute termed it a "license fee or tax," and the Supreme Court said:

"We think then that as denominated in Statute (Bankruptcy Law, Sec. 64-A) this was a tax (the annual license fee fixed by the State for the privilege of doing business within the State) imposed by the State upon the corporation for the privilege of existence and the continued right to exercise its franchise."

A fee for a license to begin business and one for a license to continue to do business permit of no substantial differentiation except that the tax law of New York imposes a lien in the case of
33 the latter and not of the former. Each is a tax, but when no lien is imposed I see no reason for granting priority in this Court.

The petition is granted to the extent above indicated.

Settle order on notice.

April 4, 1919.

A. N. H., D. J.

34

Stipulation.

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of the PEOPLE OF THE STATE OF NEW YORK, Petitioners.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of said District Court in the above-entitled matter as agreed on by the parties.

Dated May 31, 1919.

CHARLES D. NEWTON,

Attorney-General of the State of New York.

Solicitor for Appellee.

GILBERT & GILBERT,

Solicitors for Respondent.

35

Certificate of Clerk.

United States District Court, Southern District of New York.

WILLIAM L. SWEET, JR., Plaintiff,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of the PEOPLE OF THE STATE OF NEW YORK, Petitioners.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4 day of June, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-three.

[SEAL.]

ALEX. GILCHRIST, JR.

Clerk.

36

United States Circuit Court of Appeals, for the Second Circuit, October Term, 1919.

Argued November 11, 1919. Decided December 12, 1919.

No. 63.

WILLIAM L. SWEET, JR., Plaintiff,

vs.

ALL PACKAGE GROCERY STORES COMPANY, Defendant; PEOPLE OF THE STATE OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

Gilbert & Gilbert, for Appellee.

A. S. Gilbert and Francis Gilbert, of Counsel.

Charles D. Newton, Attorney General, for The People.

Robert P. Beyer, of Counsel.

WARD, Circuit Judge:

The State of New York has presented in this equity receiver-
ship claims against the All Package Grocery Stores Com-
pany, a corporation of the State of New Jersey, as follows:

"For license fee or tax state against All Package Grocery Stores
Company, a New Jersey Corporation, the predecessor of defendant,
for the privilege of exercising its corporate franchises and carry-
ing on business within the State of New York, based on the amount
of capital stock employed in New York State. \$977,86.

For license fee or tax heretofore stated against the defendant for
the privilege of exercising its corporate franchise and carrying on
business within the State of New York. \$22,517.86.

Sec. 181 of the Tax Law of the State of New York was amended
by Ch. 490 L. 1917, entitled, "An Act to amend the tax law in
relation to the license tax on foreign corporations, the material pro-
visions being:

"Sec. 181. License Tax on Foreign Corporations. Every for-
eign corporation, except banking corporations, fire marine, casualty
and life insurance companies, co-operative fraternal insurance com-
panies, and building and loan associations, doing business in this
State, shall pay to the state treasurer, for the use of the state, a
license fee of one-eighth of one per centum for the privilege of ex-
ercising its corporate franchises or carrying on its business in such
corporate or organized capacity in this state, to be computed upon
the basis of the capital stock employed by it within this state, dur-
ing the first year of carrying on its business in this state; which
first payment shall not be less than ten dollars; * * * The
amount of capital upon which such license fees shall be paid shall
be fixed by the state tax commission, which shall have the same
authority to examine the books and records in this state of such
foreign corporations, and the employees thereof as it has in
the case of domestic corporations and the comptroller shall
have the same power to issue his warrant for the collection
of such license fees, as he now has with regard to domestic cor-
porations."

The remedy which the Comptroller had to collect taxes from
domestic corporations was provided by Sec. 201, the relevant part of
which is as follows:

"Sec. 201. * * * the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof."

It is contended that this license fee is not a tax but a conventional agreement between the state and foreign corporations whereby they contract to pay a fee in consideration of the privilege of doing business in the State. But we think it quite clear that the license fee is a tax. It is provided for in the state tax law, described as a license tax in the title of the amending act, called a license tax in the description of Sec. 181 and is fixed by the State Tax Commission.

The Court of Appeals of New York in *Wise vs. Wise Co.*, 153 N. Y. 597, referring among other cases to two earlier decisions of *In re Columbian Ins. Co.* 3 Ald. Dec. 239, and *Central Trust Co. vs. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims, though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition. * * * The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or the trustee of an insolvent person, or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. * * *

In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases: (1) Where the preference is expressly given by statute as was the case in *U. S. vs. State Bank of North Carolina*, *supra*. (6 Pet. 29, 34). (2) Where, before the fund has come to the hands of the receiver or

40 trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection, as was the case in the *Columbian Ins. Co. Receivership*, 3 Abb. Dec. 239."

In *Robinson v. Mutual Reserve Co.*, 175 Fed. Rep. 624, affirmed 189 Fed. Rep. 347, we held that the State was not entitled to any preference over general creditors on its claim for taxes when the statutory lien did not arise until after receivers had been appointed and no warrant or other legal process for collection had been issued before their appointment. This was in strict accordance with the test laid down in *Wise vs. Wise*, supra, as to the State's right of preference. In *Central Trust Co. vs. Third Avenue R. R. Co.*, 186 Fed. Rep. 293, though a lien was given for taxes which came into effect before the appointment of the receivers, we construed the statute as not giving the lien any preference over prior debts specifically secured by lien. Subsequently the Appellate Division of the First Department in *Matter of Carnegie Trust Co.*, 151 App. Div. 606, affirmed 206 N. Y. 290, decided that the State as sovereign is entitled to priority of payment for taxes and any other debts, whether such priority is given by statute or not, over unsecured creditors, just as the Crown was at common law.

In this case the District Judge held that this priority as confirmed by the highest court of New York was a matter of procedure only. We think it was a matter of substantive right, being a part of the common law adopted by the State Constitution of 1777 as the law of the State of New York. Following this decision, therefore, we now hold that the State's claim for license tax, though not given a lien by statute (except from the time of the actual levy of a warrant for collection issued by the Comptroller) is entitled to priority of payment over general creditors.

41 It is further contended that the prerogative of the State of New York does not exist as against a corporation of the State of New Jersey, with which the State of New York is not in the relation sovereign. But the State is a sovereign as to all persons and things within its own boundaries and as to the property of the defendant corporation in the hands of the receivers here the prerogative clearly exists.

Decree reversed.

42 United States Circuit Court of Appeals, for the Second Circuit,
October Term, 1919.

Argued November 11, 1919. Decided December 12, 1919.

No. 63.

WILLIAM L. SWEET, JR., Plaintiff,

v.

ALL PACKAGE GROCERY STORES COMPANY, Defendant; PEOPLE OF
THE STATE OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Ward, Rogers and Hough, Circuit Judges.

HOUGH, C. J. (dissenting):

The majority decision does not enforce a specific lien securing either a tax or any other demand; it does recognize a right in the State of New York to preference and priority in the payment of debts over other creditors—by virtue of its sovereignty.

Sovereignty over what? Certainly not over the insolvent corporation, which is of another State, and not over this Court (as I
43 suppose), but over the corporate property because it is physically situated in New York. In other words, when, as here, the State has no lien affecting its debtor's res, its sovereignty is brought forward to operate in rem.

The doctrine, when not imposed by a modern statute, is a trifle archaic—yet perhaps well enough in a court of New York, which is subject in personam (so to speak) to the same sovereignty. But, so far as New York is concerned, the property of the All Package Company might just as well be in the custody of a court of California—or of Canada, as where it is.

Goods in custodia the District Court of the United States cannot be reached by any process of the State in which that Court is sitting; legally they are as remote as if in foreign parts, and the physical situation could only affect legal rights, if the legal custodian were bound by foreign law; in this instance, the law of New York. In matters such as this, it is not so bound by either comity, statute or constitutional obligation. The majority judgment can only rest on a belief that the court is affected by the sovereignty aforesaid. This I deny, and therefore dissent.

- 44 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd Day of December, One Thousand Nine Hundred and Nineteen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

WILLIAM L. SWEET, JR., Plaintiff,

v.

ALL PACKAGE GROCERY STORES COMPANY, Defendant; PEOPLE OF THE STATE OF NEW YORK, Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

H. W. R.

- 45 Endorsed: United States Circuit Court of Appeals, Second Circuit. W. L. Sweet v. All Package Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 22, 1919. William Parkin, Clerk.

- 46 United States Circuit Court of Appeals.

WILLIAM L. SWEET, JR., Complainant,

against

ALL PACKAGE GROCERY STORES COMPANY, Defendant.

In the Matter of the Petition of the PEOPLE OF THE STATE OF NEW York, Petitioners-Appellants; H. Snowden Marshall, as Receiver, Appellee.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of H. Snowden Marshall, as Receiver, respectfully shows that he is the appellee above named; that the above-entitled matter came on to be heard before this Court upon the petition of the

People of the State of New York, and on December 22, 1919, the Court handed down its decision reversing the order of the District Court.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 20, 1920. William Parkin, Clerk.

47 Petitioner now prays that a reargument of the matter may be had upon the ground that there was not called to the Court's attention, and the Court did not consider, the opinion of the United States Supreme Court in the case of *City of Richmond vs. Bird et al.*, reported in 249 United States Reports, at page 174, which opinion was not published at the time the brief for this petitioner was written and did not come to the attention of petitioner's counsel until after this Court rendered its decision on December 22, 1919, as above stated.

Your petitioner is advised, and is of the opinion, that the decision in *City of Richmond vs. Bird* is controlling upon the question in the instant case, and if it had been cited on petitioner's brief or called to the Court's attention on the argument this Court would have been justified in affirming the order of the District Court under review.

Your petitioner will ever pray, etc.

H. SNOWDEN MARSHALL,

Receiver, All Package Grocery Stores Company.

GILBERT & GILBERT,

Solicitors for Appellee.

I hereby certify that in my opinion the foregoing petition is well founded in point of law and fact and ought to be granted.

FRANCIS GILBERT,

Counsel for Appellee.

48 *Memorandum in re Petition for Reargument.*

This Court decided this case upon the theory that the State of New York was entitled to a preference in payment of its claim for license fee upon the ground of its sovereign power. It is submitted that under the authority of *City of Richmond vs. Bird* no such right exists. The United States Supreme Court there cited with approval the decision in *Jackson Coal Company vs. Phillips Line* (114 Va., 40), wherein the facts being quite analogous to those here, the Court held that the State, not having exercised its right to levy upon the property prior to the appointment of a Receiver, was in no better position than that of a general creditor. Under the New York Tax Law the license fee does not become a lien unless a warrant has been issued by the State Comptroller. No warrant was issued and no lien attached before the receivership. Not having acquired a lien, the State relied upon the claim of sovereignty. Under the doctrine enunciated as above stated, the State of New York, having failed to

exercise its right to acquire a lien, stands in no better position than a general creditor.

Respectfully submitted,

GILBERT & GILBERT.
Solicitors for Appellee.

FRANCIS GILBERT,
Of Counsel.

49 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court Rooms, Post Office Building, City of New York, on the 10th Day of February, 1920.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

WILLIAM L. SWEET, JR., Plaintiff,

v.

ALL PACKAGE GROCERY STORES COMPANY, Defendant; PEOPLE OF THE STATE OF NEW YORK, Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellee;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

H. G. W.

H. W. R.

50 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 49 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of William L. Sweet, Jr., against All Package Grocery Stores Company, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of February in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One Hundred and Forty-Fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

51 UNITED STATES OF AMERICA, *vs.*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The People of the State of New York is appellant, and H. Snowden Marshall, Receiver of All Package Grocery Stores Company, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

52 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,591. Supreme Court of the United States, No. 836, October Term, 1919. H. Snowden Marshall, as Receiver, etc., vs. The People of the State of New York. Writ of Certiorari.

[Stamped:] United States Circuit Court of Appeals. Second Circuit. Filed May 13, 1920. William Parkin, Clerk.

53 In the Supreme Court of the United States, October Term, 1919.

No. 836.

H. SNOWDEN MARSHALL, as Receiver, etc.,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

Stipulation as to Return of Writ of Certiorari.

It is hereby stipulated, by counsel for the parties to the above entitled cause, that the certified copy of the transcript of the record on file in the Supreme Court of the United — shall constitute the

return of the Clerk of the Circuit Court of Appeals for the Second Circuit to the writ of Certiorari issued herein.

A. J. GILBERT,

Counsel for Petitioner.

CORTLANDT A. JOHNSON,

Counsel for Respondent.

May —, 1920.

54 To the Honorable the Supreme Court of the United States,
Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, May 13, 1920.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,

*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

55 [Endorsed:] File No. 27,591. Supreme Court U. S. October Term, 1919. Term No. 836. H. Snowden Marshall, as Receiver, etc., Petitioner, vs. The People of the State of New York. Writ of certiorari and return. Filed June 1, 1920.

23
Office Supreme Court,
F. J. 11 13

MAR 27 1920

JAMES D. NAHER,
CLERK

No. 886294

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of All Package
Grocery Stores Company,

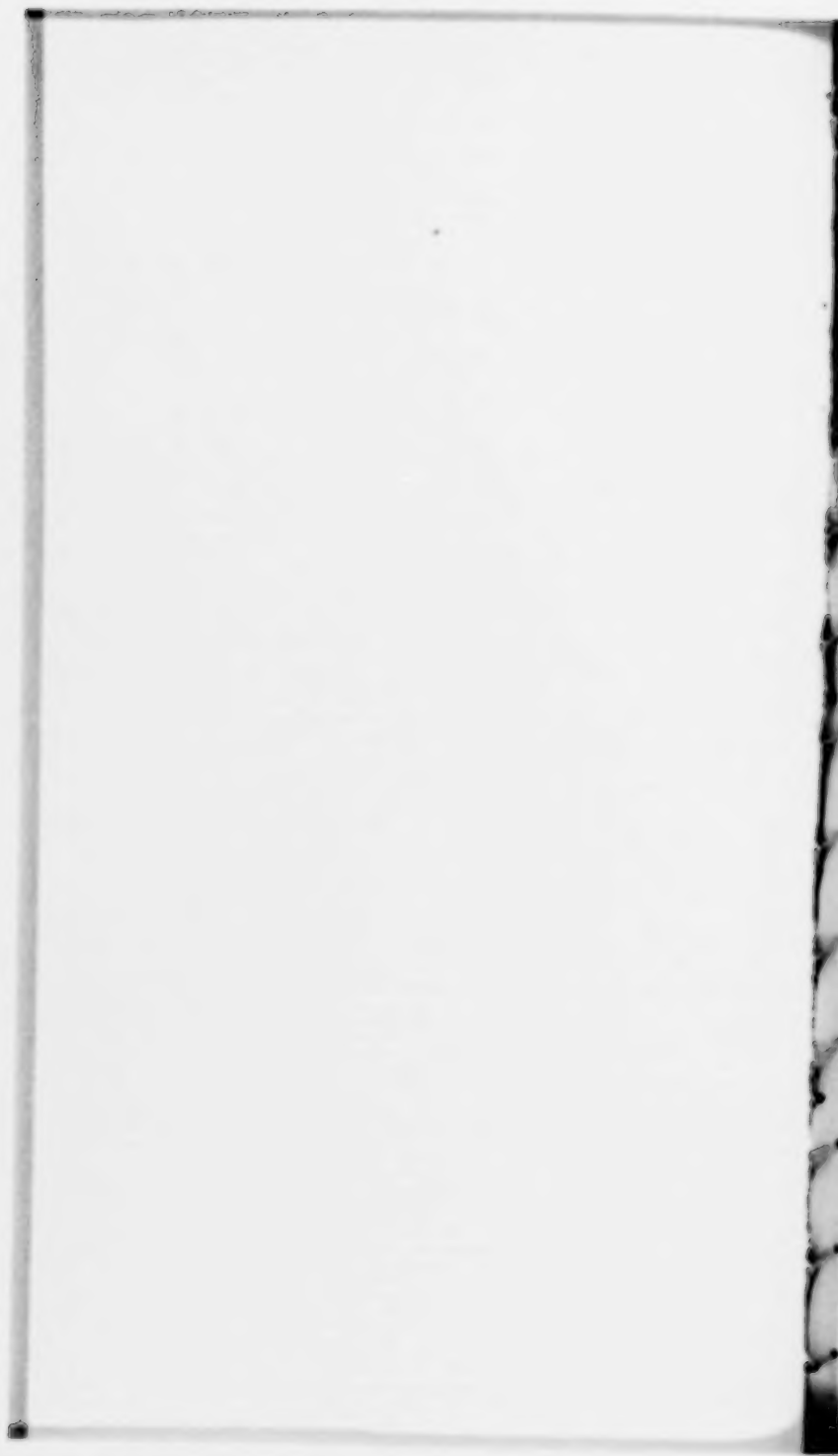
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF
IN SUPPORT THEREOF.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.



1

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of
All Package Grocery Stores Company,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW
YORK,
Respondents.

No.

2

Petition for Writ of Certiorari.

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner, H. Snowden Marshall, prays for a writ of *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit in a cause entitled William L. Sweet, Jr. against All Package Grocery Stores Company.

3

Questions Presented.

1. Has the State of New York, upon the sole ground of *sovereign prerogative*, a lien, upon the property of a foreign corporation, for a license fee charged by the State

- 4 for the privilege of doing business therein when such property is under the exclusive jurisdiction of the Federal Courts in an equity suit.

2. Has the State of New York, in disregard of the limitations of its own statutes, a lien upon the property of a foreign corporation in the hands of a Federal receiver, in an equity suit, for the amount of a license fee, where the State fails in the performance of conditions precedent on the part of the State, required by the statute in order to secure such lien?

- 5 3. Was the Circuit Court of Appeals, in deciding the foregoing question, bound by the decisions of the courts of the State of New York; or, are they not questions of general jurisprudence upon which the Federal Courts are free to exercise their own independent judgment?

Statement of the Case.

Petitioner was appointed Receiver of the All Package Grocery Stores Company by the United States District Court for the Southern District of New York, in an equity suit in said Court brought by William L. Sweet, Jr., as a creditor of the Company, to conserve its assets.

- 6 William L. Sweet, Jr., the complainant in said cause, was and is a citizen and resident of the State of New York and of the Southern District of New York, and the said All Package Grocery Stores Company, the defendant in said cause, was and is a corporation organized under the laws of the State of Delaware and a citizen and resident of said State.

The ground of jurisdiction of the cause by the United States District Court was the said diversity of citizenship of the parties thereto, as more fully appears by the bill of

complaint filed therein, a certified copy of which is submitted herewith as an appendix to this petition. 7

The Delaware corporation succeeded to the assets and business of a New Jersey corporation of the same name.

The New Jersey corporation carried on business in New York and became indebted to the State of New York for a *license fee* of \$977.86 for the privilege of exercising its corporate franchise therein and for an *annual franchise tax* of \$259.70 on the capital actually employed by it in that State in 1915.

Thereafter the Delaware corporation carried on the business in New York and became indebted to the State of New York for a *license fee* of \$22,517.86 for the privilege of exercising its corporate franchise therein and for an *annual franchise tax* of \$441.99 based on the capital actually employed by it in that State in 1916. 8

Under Section 197 of the New York Tax Law *annual franchise taxes* become a lien upon and bind all the real and personal property of a corporation from the time when they are payable, but under Section 201 of that Law *license fees* do not become a lien on the property of a corporation unless a warrant of the State Comptroller has been issued to the Sheriff for the collection thereof, and then only from the time an actual levy is made thereunder. No warrant was ever issued for the collection of the *license fees* in question.

The State of New York presented a claim against the estate of the Delaware corporation in the hands of petitioner for said *license fees* amounting in the aggregate to \$23,515.72, and for said *annual franchise taxes*, which with interest and penalty amounted to the sum of \$843.58. In the claim it was asserted "that said taxes accrued and became a lien on all property of defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of a Receiver herein." 9

10 The claim was heard by Hon. Augustus N. Hand, U. S. District Judge. He upheld the right of the State to a lien in respect of the annual franchise taxes because a lien therefor was imposed by Section 197, and he granted priority in payment of said sum of \$843.58 on that ground. He denied the right of the State to a lien in respect of the license fees because no lien had been acquired under the statute (the Comptroller not having issued his warrant for the collection thereof) and he allowed the sum of \$23,515.72 due to be proved only as a general claim.

11 The State of New York appealed to the Circuit Court of Appeals for the Second Circuit from so much of Judge Hand's order as disallowed its claim for lien in respect of license fees. In the Circuit Court of Appeals the State of New York abandoned the contention set up in its original claim that the amount due became a lien pursuant to the provisions of the Tax Law, and instead claimed a right to preference in payment by reason of its sovereign prerogative. The Circuit Court of Appeals, by a divided Court, upheld the claim to preference on the ground of sovereign prerogative, Judge Ward writing the prevailing opinion which was concurred in by Judge Rogers, and Judge Hough writing a dissenting opinion. A final decree was entered reversing the order of the District Court and remanding the cause. Petitioner applied to the Circuit Court of Appeals for a re-hearing which was denied.

12

Reasons for the Allowance of the Writ.

13

- (1) *The decision of the Circuit Court of Appeals is directly opposed to the view of this Court expressed in the case of City of Richmond vs. Bird (249 U. S., 174).*
- (2) *The decision is also contrary to the decision of the Supreme Court of Virginia in the case of Jackson Coal Company vs. Philips Line (114 Va., 40).*
- (3) *The decision is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of State of Alabama vs. Martin (256 Fed., 213).*
- (4) *The public character of the question involved.*

14

The question involved affects approximately three hundred general creditors of the Delaware corporation. Although it was never adjudicated a bankrupt, the corporation is hopelessly insolvent. One dividend of 10% has been paid to the general creditors and an amount reserved in petitioner's hands sufficient to pay the State's claim for license fee in full if it should be ultimately held that the State has a priority in respect thereof. If the contention of the State is finally upheld, it will exhaust the fund in the hands of petitioner and of course work a hardship upon the general creditors as a class who have extended credit which has resulted in the creation of the fund in petitioner's hands upon which the State now seeks to establish a lien in disregard of the limitations of its own statutes. The four judges who heard the cause were equally divided in their views.

15

16 For these reasons it is submitted that a writ of *certiorari* should be issued and the questions involved be determined by this Court.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify the above cause to this Court for review and determination as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

H. SNOWDEN MARSHALL,
Petitioner.

A. S. GILBERT,
WM. J. HUGHES,
Counsel.

State of New York, }
County of New York, } ss.:

19

H. Snowden Marshall, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

H. SNOWDEN MARSHALL.

Sworn to before me this }
11th day of March, 1920. }

S. S. RICHARDS,

(Seal) Notary Public,
New York County.

20

We hereby certify that we have examined the foregoing petition for writ of *certiorari*, and that in our opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

March 11, 1920.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

21

22

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of
All Package Grocery Stores Company,
Petitioner,

against

23

THE PEOPLE OF THE STATE OF NEW
YORK,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

I.

It is axiomatic that a tax law must provide the method for its enforcement and the collection of the tax.

24

The New York Tax Law* (Section 197) provides that practically every tax imposed upon corporations shall be a lien upon and bind the property of the corporation from the time that it is payable. Section 197 does not include

*The relevant sections of the New York Tax Law, viz., Sections 181, 197 and 201, are printed as an appendix to the brief.

license fees from foreign corporations—these are covered by Section 201 under which the lien does not accrue unless a warrant for the collection of the license fee has been issued to the Sheriff and then only from the time an actual levy is made under such warrant. 25

A method for the collection of the license fee therefore is specifically prescribed, namely by the issue of a warrant and a levy thereunder.

The State of New York was not obliged to make this distinction between corporation taxes generally and license fees. It could have imposed upon foreign corporations for the privilege of doing business therein any condition it saw fit (*Home Ins. Co. vs. New York*, 134 U. S., 594). It could have provided, as Ohio and other equally sovereign states have done, namely, that the fees, taxes and penalties, required to be paid, shall be the first and best lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof (*Ohio Tax Law of 1911, Sec. 117*). But it did no such thing. It invited foreign corporations to come into and transact business within its borders and fixed the condition therefor. As a penalty for failure to pay the license fee, the State closes the doors of its courts to such delinquent foreign corporations and renders contracts made by them unenforceable therein. The statute was notice to creditors dealing with such corporation that, so far as the State's claim for license fee was concerned, the corporation's property was not subject to any lien superior to their rights as general creditors save and excepting only upon the performance of certain conditions precedent upon the part of the State, which in the instant case were not performed. 26 27

II.

The decision of the Circuit Court of Appeals is opposed to the view of this Court expressed in the case of *City of Richmond vs. Bird* (249 U. S., 174), and by the Supreme Court of Virginia in the case of *Jackson Coal Co. vs. Phillips Line* (114 Va., 40).

29 In the case of *City of Richmond vs. Bird*, this Court approved the doctrine laid down in *Jackson Coal Co. vs. Phillips Line*, and took the view that the State of Virginia having by its statutes fixed the method for the collection of a tax, and the conditions imposed by the statute not having been complied with on the part of the State, the latter was in no better position than a general creditor where the property of the corporation had passed into the hands of the receiver. That is precisely the situation here. The Comptroller of the State of New York might have issued his warrant to the Sheriff for the collection of the license fee and the Sheriff might have made an actual levy under the warrant, whereupon a lien would have accrued. This, however, was not done. The State took no proceeding whatever to enforce the collection of the license fees and the property of the corporation passed into the hands of the Receiver free of any lien under the statute. Notwithstanding this fact, the State now claims a *lien* by
30 virtue of its sovereignty, but as Judge Hough in his dissenting opinion says:

"Sovereignty over what? Certainly not over the insolvent corporation, which is of another State, and not over this Court (as I suppose), but over the corporate property because it is physically situated in

New York. In other words, when, as here, the State has no lien affecting its debtor's *res*, its sovereignty is brought forward to operate *in rem*." 31

III.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *State of Alabama vs. Martin* (256 Fed., 213).

In *State of Alabama vs. Martin*, the Court held that the claim of the State of Alabama against a bankrupt corporation for the hire of convicts, was not entitled to priority of payment. The Court said: 32

"The Common Law of England so far as not inconsistent with the Constitution Laws and institutions of Alabama prevails in that State. • • • It is claimed that the State had the priority which the Common Law accorded to debts owing to the sovereign. There are Alabama statutes the enactment and existence of which seem to us to be inconsistent with the hypothesis that the priority claim exists under the law of that State."

The Court then enumerates several classes of debts of decedents' estates, which have priority over taxes. In other words, the Court held that the State of Alabama had by its own statutes waived any claim to priority which it might have asserted on the ground of its sovereign prerogative. An analogous situation exists in the instant case. As pointed out, the State of New York might have 33

- 84 made the license a lien as soon as it became due, just as it made corporation taxes generally a lien, but when it expressly postponed the accruing of the lien it waived any claim it might possibly have asserted on the ground of its sovereign prerogative. If this is not so, then the language of Section 201 is meaningless surplusage.

IV.

The matter in controversy is one of general jurisprudence.

- 85 The State of New York in its claim *presented to the District Court* asserted a lien under the statute. The statutory conditions not having been complied with, obviously no lien existed under the statute. The State abandoned that theory in the *Circuit Court of Appeals* and relied solely upon its right as a sovereign. There was, therefore, no question of statutory construction in respect of which the Circuit Court of Appeals might be bound by the decisions of the State court. Nor was the Circuit Court of Appeals precluded from the exercise of an independent consideration of the case by any *rule of property* laid down by a New York Court. This Court has defined rules of property as rules relating to *real estate* (*Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349-360).

The public character of the question involved.

Quite aside from the fact that the decision in this case affects the rights of several hundred general creditors of the Delaware corporation, the question is invested with a public character by reason of the extraordinary nature of the claim asserted by the State against the citizen of another and equally sovereign State. The State of New York invites foreign corporations to come within its borders under the terms of a statute which it now claims it has the right to repudiate, as expediency may suggest, although it still remains upon its statute books. This, it is submitted, is a dangerous doctrine, repugnant to the principles of comity which should exist between States, and in the public interest the question whether such a doctrine is controlling upon the Federal Courts should be definitely determined by this Court.

VI.

The prayer of the petitioner should be granted.

Respectfully submitted,

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

APPENDIX.

"Sec. 181. LICENSE TAX ON FOREIGN CORPORATION

Every foreign corporation, except banking corporation, fire, marine, casualty and life insurance companies, cooperative fraternal insurance companies, and building and loan associations, doing business in this State, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collection

41

42

tion of such license fees, as he now has with regard to 43
domestic corporations. No action shall be maintained or
recovery had in any of the Courts in this state by such
foreign corporation after thirteen months from the time
of beginning such business within the state, without ob-
taining a receipt from the comptroller for the payment
of the license fee upon the capital stock employed by it
within this state during the first year of carrying on its
business in the state."

"Sec. 197. PAYMENT OF TAX AND PENALTIES FOR 44
FAILURE. A tax imposed by Section one hundred and
eighty-two¹ or one hundred and eighty-six² of this chapter
shall be due and payable into the state treasury on or
before the fifteenth day of January in each year. A tax
imposed by section one hundred and eighty-four of this
chapter on a transportation or transmission corporation,
or by section one hundred and eighty-five, on elevated rail-
roads or surface railroads not operated by steam, shall be
due and payable into the state treasury on or before the
first day of August in each year. A tax imposed by section
one hundred and eighty-seven of this chapter on an insur-
ance corporation shall be due and payable into the state
treasury on or before the first day of June in each year.
A tax imposed by section one hundred and eighty-eight³,
one hundred and eighty-eight-a⁴ or one hundred and eighty-
nine⁵ shall be due and payable into the state treasury on
or before the first day of September in each year. A tax
imposed by section one hundred and ninety-one of this 45

1. Annual franchise tax on domestic and foreign corporation gen-
erally.
2. Franchise tax on water-works companies, gas companies, elec-
tric or steam heating, lighting and power companies.
3. Franchise tax on trust companies.
4. Taxation of investment companies.
5. Franchise tax on savings banks.

- 46 chapter on a foreign banker shall be due and payable to the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax, a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax, and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make the annual report required by this article, or failing to make an special report required by the commission, within an reasonable time to be specified by the commission, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. *Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.*
- 47

Sec. 201. WARRANT FOR THE COLLECTION OF TAXES. After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county

of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. *Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof.* The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a Court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner."

49

50

51

52

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of
All Package Grocery Stores Com-
pany,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW
YORK,

Respondent.

53

To Honorable Charles D. Newton, Attorney General of the
State of New York, and to the above named re-
spondent:

Please take notice that we shall file in the Office of the
Clerk of the Supreme Court of the United States the fore-
going petition for writ of *certiorari* and brief, together with
the printed record of the above entitled cause, and that
we shall, on the 29th day of March, 1920, submit the peti-
tion to the Court.

A. S. GILBERT,

WM. J. HUGHES,

Counsel for Petitioner.

54

Received a copy of the foregoing notice and of the peti-
tion for writ of *certiorari* and brief referred to therein, this
day of March, 1920.

Attorney General of the State of New York,
Counsel for Respondent.

No. 8 ~~13~~ 294

Supreme
United States District Court,
SOUTHERN DISTRICT OF NEW YORK.

WILLIAM L. SWEET, JR.,
Complainant,
against

ALL PACKAGE GROCERY STORES COMPANY,
Defendant.

IN EQUITY No. E 14—360.

Appendix to Petition for Writ of Certiorari.
Bill of Complaint-William L. Sweet, Jr., vs.
All Package Grocery Stores Co.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.



United States District Court,

SOUTHERN DISTRICT OF NEW YORK.

WILLIAM L. SWEET, JR., Complainant,	}	Index
against		In Equity
ALL PACKAGE GROCERY STORES COM- PANY,		No. E 14—
Defendant.		360.

2

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE
UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW
YORK :

William L. Sweet, Jr., of the City and State of New York, and a citizen and resident of said State, having an office for the transaction of business in the Borough of Manhattan, City and State of New York, in the Southern District of New York, brings this bill of complaint against All Package Grocery Stores Company, a corporation organized and existing under the laws of the State of Delaware, and a citizen and resident of said State, which has places for the transaction of business, and large amounts of property within the Borough of Manhattan, City, County and State of New York, in the Southern District of New

3

4 York, and thereupon your operator respectfully shows to the Court as follows :

FIRST. That your orator is a citizen of the State of New York, maintaining an office in the Borough of Manhattan, in the City of New York, in the Southern District of New York.

5 SECOND. That the defendant, All Package Grocery Stores Company, is a corporation organized and existing under the laws of the State of Delaware, and is a citizen and resident of said State; that said defendant has places for the transaction of business, and large amounts of property, within the Borough of Manhattan, in the City, County and State of New York, in the Southern District of New York, and is within the jurisdiction of this Court.

THIRD. That the amount involved in this controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000).

FOURTH. That the defendant is engaged in the business of operating, conducting and maintaining a series of retail grocery stores in the Borough of Manhattan, City of New York, in the Southern District of New York, and also in the Borough of Brooklyn, City of New York, and in the County of Cook, State of Illinois.

6 FIFTH. That your orator is informed and believes that the defendant now has on hand a large amount of merchandise, materials, raw, manufactured and in process of manufacture, maintains a large force of employees and has numerous leases upon property operated as retail grocery stores. That if said merchandise and materials are completed into finished form, and sold through the regular channels of defendant's retail stores, a substantial profit will result to the defendant Company therefrom; that the character and nature of the defendant Company's business is such that a large cash working capital is re-

quired at all times in order to enable the defendant Company to purchase and possess the requisite materials and merchandise which are sold over the counters of defendant's retail stores.

SIXTH. That your orator is a creditor of the defendant corporation, and your orator did on the 24th day of August, 1917, advance and loan to the defendant corporation the sum of \$100,000, and as security therefor he received and now holds four promissory notes each for the principal sum of Twenty-five Thousand Dollars (\$25,000), bearing interest at the rate of six (6%) per cent. per annum, and representing the aforesaid advance of cash made by your orator to the defendant corporation; such notes were each of the same tenor except that upon their face they were to mature one hundred sixty-five (165) days, one hundred seventy-five (175) days, one hundred eighty-five (185) days and one hundred ninety-five (195) days respectively after August 24, 1917, but in the event of a Receiver being appointed for the defendant corporation, each of said notes by their terms were, at the option of the holder, deemed to become due and payable forthwith upon the happening of such event. That to your orator there were also tendered as collateral security for the payment of said notes certain certificates for shares of preferred stock of the defendant corporation at the time held in the treasury of the defendant corporation, which certificates for preferred stock were made out in the name "William L. Sweet, Jr., Pledgee," and were received and held only as and for collateral security to the repayment of the four (4) notes aforesaid.

SEVENTH. That on or about the 29th day of October, 1917, Isaac Baschkopf filed a bill of complaint in this Court against the above-named defendant wherein, among other things, it was alleged that the said bill was filed on "behalf of himself and all other stockholders of All Pack-

10 age Grocery Stores Company and on behalf of all other parties in interest as shall be entitled to and shall elect and be authorized to join in this action," and praying for the appointment of a Receiver or Receivers for the defendant corporation with power to take into their possession, hold and manage the same under the direction of this Court. That upon said complaint and upon the answer of the defendant corporation, and on or about the 7th day of November, 1917, this Court did appoint Herbert A. Emerson and H. Snowden Marshall, Receivers of all the property and assets of the defendant corporation, and that in suits ancillary to said suit brought against the above named defendant corporation, and in the District Court of the United States for the Northern District of Illinois, 11 in which property of said defendant is located, the District Court of said District duly appointed Herbert A. Emerson and Granville Browning to be Ancillary Receivers of the property and assets of the defendant corporation in such jurisdiction. That said Receivers have qualified and entered into possession of the property, and therefore in the possession of the defendant corporation, and at all times since have been and still are in possession of said premises, and are managing and conducting the business of the defendant corporation.

12 EIGHTH. That on or about the 28th day of November, 1917, your orator exercised the option vested in him by virtue of the terms of said notes and did elect to deem the same due and payable forthwith, and presented the aforesaid four notes, each for the sum of \$25,000, to H. Snowden Marshall, one of the Receivers appointed by this Court, and demanded payment thereof. The same were not paid and no part of the same has been paid, although all of said notes by their terms have matured and are now due and owing in full, the amount due thereon being said sum or aggregate of \$100,000, with interest thereon at six per cent. from August 24, 1917, making in all the sum of \$101,700,

as of November 28, 1917, which sum, with interest from the latter date, remains now due, owing and unpaid. That your orator is informed and believes that there are numerous and sundry other creditors for merchandise sold to the defendant corporation, aggregating at least the sum of \$100,000, in addition to the sums owed to your orator, and the defendant corporation is unable at the present time to pay in full its obligations now matured, due and owing. That this bill is brought on behalf of your orator and on behalf of all other creditors of the defendant Company who may hereafter join in the prosecution of this suit and contribute to the expenses thereof.

NINTH. That as your orator is informed and believes, while the property and assets of said defendant corporation are of great value as an active going and operating business, nevertheless said property and assets if sold or disposed of separately and not as a unity are of much less value, and if so sold or disposed of might be insufficient to provide in full for the payment of its indebtedness. That it is essential to the creditors secured and unsecured, and to the stockholders of said defendant corporation that its property and assets be conserved and protected, and that they shall be held together, operated and ultimately sold or otherwise disposed of as an active going entirety. That said property and assets if permitted to be dismembered by separate sales under execution, or if said property cease to be operated or be allowed to become disused, disorganized, and its organization disrupted and scattered, or if the good will of said defendant corporation shall fail to be preserved by continuing said corporation in business, or if said property and assets be sold and disposed of other than as an active and going entirety, the rights of your orator and of the creditors, both secured and unsecured, and of the stockholders of said defendant corporation, will be irreparably injured and impaired.

- 16 **TENTH.** That there is danger that other creditors of the defendant corporation may seek to enforce their claims by instituting proceedings against the defendant corporation in this jurisdiction and other places where the defendant corporation has property and plants, and may by levy of attachment, writs or otherwise take possession of the property or plants of the defendant corporation in this and other jurisdictions where the defendant corporation has such and that such danger is substantially increased by the filing of this bill. That there is grave danger that unless a Receiver or Receivers be at once appointed to take charge and possession of the property and assets of the defendant corporation of every kind and description,
- 17 that the defendant corporation will be subjected to a multiplicity of conflicting suits and litigation of various sorts in this and other jurisdictions in which the defendant corporation has property and does business, and that its assets will be dissipated and sacrificed; that some creditors will secure a preference over other creditors; that its business will be interrupted and destroyed and the value of its property and assets generally thereby substantially diminished and impaired; that if said business is allowed to be continued, and if its assets are not sacrificed by forced sales, on executions, attachments or other judicial process, the assets of the defendant corporation are in excess of all its liabilities to creditors, and will, if properly administered, be sufficient to pay all of its debts and will
- 18 leave a substantial residue for its stockholders; that under these circumstances the interference of a court of equity for the protection of the rights of your orator is imperatively required for the protection of the creditors, both secured and unsecured, and of the stockholders of the defendant corporation, and especially for the immediate appointment of a Receiver or Receivers to take charge of and to preserve the property of the defendant corporation, to continue the operation of its business, and to collect and receive and properly appropriate earnings, income and

7

profits thereof, until the final decree of the Court in the premises. 19

ELEVENTH. That no proceedings have been had at law or in equity, for the collection or enforcement of said notes owned and held by your orator, or any part thereof, save only this suit, and that your orator has no adequate relief at law, and that the relief to which he is entitled can only be granted by a court of equity.

TWELFTH. That upon the application of your orator an order has been duly made and filed by this Honorable Court granting leave to your orator to file this bill of complaint.

Wherefore, as your orator has no remedy at law and can only have relief in equity, your orator files this his bill of complaint as above stated, and in behalf of himself and of all others similarly situated who may come in and contribute to the expense thereof and pray for equitable relief as follows: 20

1. That the rights of your orator and of the other creditors of the defendant corporation may be ascertained and decreed, and that the Court will fully administer the property and funds in which your orator is interested, and will for such purpose marshal all the assets of the said defendant, All Package Grocery Stores Company to ascertain the several and respective liens and priorities existing thereon, and to decree and enforce the rights, liens and equities of the said defendant, and ultimately will cause said property and assets or their proceeds and said funds to be distributed among those persons, firms and corporations ascertained to be legally or equitably entitled thereto in accordance with their respective rights and interests. 21

2. That for the purpose of preserving and protecting the property and assets of the defendant, All Package Grocery Stores Company, and that they may be held together, operated, and ultimately sold or otherwise dis-

22 posed of as a going entirety, a Receiver or Receivers be appointed to take charge of and to manage and operate the property and assets of the said defendant corporation of every kind and description.

3. That said Receiver or Receivers be authorized and empowered to take possession of the plants, property, assets and business of the defendant corporation, and to operate the said plants, and to continue and conduct the said business, and to employ such agents, servants and workmen as may be necessary from time to time for the conduct of said business, and to continue its existing manufacturing, selling, business and financial agreements and relations until the further order of the Court.

23 4. That said Receiver or Receivers may make and perform contracts for the manufacture and sale of any of the products which the defendant corporation is or has been engaged in manufacturing, and may incur any and all obligations necessary and proper including the purchase of materials and supplies, the employment of labor, and in any other manner requisite therefor, and may carry out and perform any of said contracts heretofore made by the defendant corporation.

24 5. That said Receiver or Receivers be authorized to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, books, papers, choses in action, and all other property whatsoever of said defendant corporation, and to institute, prosecute and defend suits at law or in equity for the recovery of any assets, property, damages or demands belonging to or existing in favor of the said defendant corporation and settle and compound all debts or other claims whatsoever of said defendant corporation.

6. That all persons, firms and corporations whatsoever be enjoined from levying executions upon, attaching, inter-

meddling with or taking possession of any property of the said defendant corporation.

25

7. That the officers, agents, employees and servants of said defendant corporation be enjoined from selling, transferring and disposing of or in any manner interfering with any of the property of said defendant corporation or taking possession of the same, or interfering with the said Receiver or Receivers in the performance of his or their duties.

8. That the officers, agents, servants and employees of the defendant corporation be forthwith required to transfer, convey, assign and deliver unto the said Receiver or Receivers, or his or their duly authorized agents or representatives, all the property and assets of the said defendant corporation, and to take such action as may be necessary thereto.

26

9. Your orator further prays your Honorable Court to grant to him such additional and further relief as the exigencies of the case may require and as to this Honorable Court may seem meet.

10. That the writ of subpoena be granted to your orator, directed to the defendant corporation, All Package Grocery Stores Company, requiring it in accordance with the rules in equity of this Court to appear herein upon a day certain and make answer, but not under oath (an answer under oath being hereby expressly waived), and further to conform and abide by said order, direction and decree in the premises as to the Court shall seem meet; and your orator will ever pray.

27

W. G. SWEET, JR.
STETSON, JENNINGS & RUSSELL,
Solicitors.

THOMAS GARRETT, JR.,
Of Counsel.

28

State of New York,
County of New York,
Southern District of New York, } ss. :

WILLIAM L. SWEET, JR., being by me first duly sworn, did depose and say that he is the complainant named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein alleged upon information and belief, and as to those matters he is credibly informed and verily believes the same to be true.

29

W. L. SWEET, JR.

Sworn to before me this }
30th day of November, 1917, }

EDWARD U. ROTH,
Notary Public,
New York County.

(Seal)

#143

30

27
MAR 27 1920
No. 36 294 JAMES D. NAHER
CLERK

IN THE
Supreme Court of the United States,

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of All Package
Grocery Stores Company,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

**MEMORANDUM OF RESPONDENTS IN OPPOSITION
TO PETITION FOR A WRIT OF CER-
TIORARI.**

CORTLANDT A. JOHNSON,
*Deputy Attorney General of the
State of New York,
Counsel for Respondents.*



Supreme Court of the United States.

H. SNOWDEN MARSHALL, as Re-
ceiver of ALL PACKAGE GRO-
CERY STORES COMPANY,
Petitioner,

against

THE PEOPLE OF THE STATE OF
NEW YORK,
Respondents.

**MEMORANDUM ON BEHALF OF RESPOND-
ENTS IN OPPOSITION TO PETITION FOR
THE ISSUANCE OF A WRIT OF CERTIO-
RARI.***

H. Snowden Marshall, as Receiver of All Pack-
age Grocery Stores Company, has petitioned this
Court for a writ of certiorari to review a decision
of the Circuit Court of Appeals for the Second
Circuit, which decision reversed a decree of the
United States District Court for the Southern Dis-
trict of New York and held that two claims filed

*The opinion of the Circuit Court of Appeals is
printed in the appendix hereto for the convenience
of the Court.

on behalf of the State of New York in the sum of \$977.86 and \$22,517.86 for license fees for the privilege of exercising corporate franchises and carrying on business in the State of New York based upon the amount of capital employed in New York State were preferred claims, payable as such by the petitioner out of the funds in his hands.

The point involved below was essentially one of local law which had been authoritatively decided by the highest Court of the State of New York, and the Court below merely followed, as it was bound to do, the rule announced in that tribunal. The question, moreover, is one of no high degree of gravity and no general importance. It is submitted that under such circumstances the application should be denied.

In re Woods, 143 U. S., 202, 204, 205.

Statement.

Section 181 of the Tax Law of the State of New York, under which the claims under consideration arose, reads as follows:

“Every foreign corporation, excepting banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this state, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in

such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collection of such license fees, as he now has with regard to domestic corporations. No action shall be maintained or recovery had in any of

the Courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in the state."

The remedy conferred by said section for the collection of said license fees upon foreign corporations, is found in Section 201 of the Tax Law, which reads as follows:

"After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein

specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the persons, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof. The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner."

The question involved is exclusively one of state sovereignty and the prerogative attaching by virtue thereof in the priority of payment of debts due the state of a public character. This right exists independent of any proceeding which the state may take or omit to take under the statute.

I.

The license fees with respect to which preference was allowed were tax obligations.

In *Heerwagen vs. Crosstown Street Ry. Co.*, 90 N. Y. App. Div., 275, the Court construed a similar license fee as imposed upon foreign corporations under Section 181 of the Tax Law of the State of New York for the privilege of exercising their

corporate franchise in the State of New York as a tax, stating, per *Spring, J.*, page 283:

"The tax which a stock corporation pays for the privilege of doing business is based upon its capital stock, and is the compensation which it pays for that privilege. It has the attribute of a tax as well as that of compensation. Whatever may be the condition imposed for the privilege of doing business—whether designated as a bonus, compensation, a license fee or in name a tax—it is in effect a tax. *Burroughs Tax. Sec.* 131; *Gordon vs. Appeal Tax Court*, 3 How. (U. S.), 133; *Home Insurance Co. vs. New York State*, 134 U. S., 594; *Chicago General Railway Co. vs. City of Chicago*, 176 Ill., 253."

The Appellate Division follows *Maine vs. Grand Trunk Railway Co.*, 142 U. S., 217, where the requirement to pay an annual sum to the State of Maine imposed upon railway companies for the privilege of exercising their corporate franchise in that State was construed to be a tax.

Section 181 of the Tax Law received construction in *People ex rel. Elliott-Fischer Co. vs. Sohmer*, 148 App. Div., 514 (affirmed 206 N. Y., 634, on the opinion of the Court below), the Court, throughout its opinion speaking of the State charge as a tax, *KELLOGG, J.*, stated, page 515:

"This license *tax* first came into our law by Chapter 240 of the Laws of 1895, which was entitled 'An Act to provide for licensing foreign stock corporations.' It provided for such corporations then authorized to do business in this

State a license fee of one-eighth of one per centum payable on December 1, 1895, 'to be computed upon the basis of the amount of capital stock employed by it within this State during the year preceding that date,' and for such corporations thereafter authorized to do business in this State it provided a like license fee payable before receiving the certificate of authority 'to be computed upon the basis of the capital stock employed by it within this State for its business during the first year of carrying on its business in this State.' The *tax* was to be paid at once. Chapter 143 of the Laws of 1886 imposed an organization tax of one-eighth of one per cent. upon the capital stock of a domestic corporation, and in the year 1895 the Comptroller in his report to the Legislature suggested that foreign corporations were required to pay no organization *tax* here, and, therefore, had an advantage over domestic corporations which was an inducement to corporations to organize outside of the State to do business in the State, and he suggested that such corporations should have no advantage over domestic corporations, and referred to the fact that the last Legislature had passed an act which would compel foreign corporations to pay a *tax* similar to the organization tax of domestic corporations, but that the act was so defective that it was not suffered to become a law. It is evident by the passage of the statute in question immediately following the report, and from the nature of the act itself, that its purpose was to impose upon foreign corpor-

ations a tax similar to the organization tax required of domestic corporations."

In *People ex rel. U. S. A. P. P. Co. vs. Knight*, 174 N. Y., 475, the nature of organization taxes upon domestic corporations, to which the taxes in the instant case are assimilated, was considered, and the Court of Appeals held that such taxes, although in the nature of license fees for the right to assume corporate existence, were a part of the taxing system of the State of New York, and that it was a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenue of the State. "If the grantee accepts the boon it must assume the burden."

The tax in the instant case is analogous to that considered in *Home Insurance Co. vs. New York*, 134 U. S., 594, where the tax was construed as being on the corporate franchise or business of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax, and it was held that no constitutional objections lies in the way of a Legislature prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.

In the *Knight* case, *supra*, the Court further held there was no distinction in the policy of the State of New York in taxing domestic and foreign corporations, stating, per VANN, J., page 484:

"In the instance of a foreign corporation it is not its franchise that is taxed, because it is

not subject to the laws of this State, but it is that intangible property which rests solely in the privilege allowed it of exercising its franchise within the State, upon which the tax is levied."

This public nature of the obligation created under Section 181 of the Tax Law of the State of New York is recognized in all the opinions of the Courts below.

II.

The State of New York is entitled to a preference in payment of the claim for taxes by reason of its sovereign prerogative.

The State of New York has adopted as a part of its jurisprudence the Common Law doctrine of state preference in the payment of demands due it. In the Matter of the Liquidation of the Carnegie Trust Company, 151 N. Y. App. Div., 606; 206 N. Y., 390, both the Appellate Division of the Supreme Court of the State of New York and the New York Court of Appeals held that all claims due to the state from an insolvent corporation, no matter of what character, were preferred over all other unsecured creditors, as Mr. Justice SCOTT stated in 151 App. Div., 610:

"If the State, by virtue of its inherent prerogative right is entitled to a preference in the payment of taxes which are but debts due to the State created by the exercise of its arbi-

trary power, it is but a step to hold that it is entitled to a preference in the payment of other debts by virtue of the same prerogative right. And so it has generally been held in States which have adopted the common law of England (*Robinson vs. Bank of Darien*, 18 Ga., 165; *Seay vs. Bank of Rome*, 66 *id.*, 609; *Booth vs. State of Georgia*, 134 *id.*, 163; *State vs. Bank of Maryland*, 6 Gill & J., 205; *Oren vs. Wrightson*, 51 Md., 34; *State vs. Northern Trust Co.*, 70 Minn., 393; *State vs. Bell*, 64 *id.*, 400; *Ins. Comr. vs. Commercial Mutual Ins.*, 20 R. L., 7. See also 26 Am. & Eng. Ency. of law (second edition), 479, and cases cited)."

In the Court of Appeals the authorities were fully reviewed in the affirming opinion of Mr. Justice HAIGHT, who thus summarized its determination (206 N. Y., 399):

"We thus find our court fully committed upon the question under discussion, and we entertain no doubt as to the wisdom of now adopting it."

The only limitation upon the sovereign prerogative right of preference pertains to prior specific liens obtained by creditors.

In the able opinion in *Matter of Niederstein*, 154 N. Y. App. Div., 238, the sovereign right of preference was applied in the liquidation of estates of decedents, the Court holding that the common law doctrine that debts due the sovereign were preferred over other debts of the same class was incorporated as part of the jurisprudence of the

State, and that this prerogative right had never been abrogated or affected in any manner.

In *Matter of Wesley*, 156 N. Y. App. Div., 463, the sovereign right of preference was recognized and applied to the claim of the State for maintenance of an incompetent, this result being in harmony with the laws of the State and its Constitution making the claims of the State preferred over other creditors of an insolvent.

In *People vs. Metropolitan Surety Co.*, 158 App. Div., 647, a franchise tax levied against a corporation for the privilege of doing business in the State of New York was held entitled to a preference, upon the authority of the cases cited. The same ruling was made in relation to a personal property tax claim against a corporation in liquidation (*Mixer vs. Mohawk Clothing Co.*, 155 N. Y. Supp., 647).

The Bankruptcy Law of the United States has been construed as not affecting the sovereign prerogative of either the National government or that possessed by any of the individual states. This is the result of the firmly established principle, engrafted in our jurisprudence of adoption from the common law of England—a principle which is recognized in its fullest extent in the State of New York—that as a result of any general statute, whereby any prerogative, right, title or interest is sought to be taken from either the Federal or any State government, neither is bound, unless the statute is given this extended application by express words (*United States vs. Herron*, 87 U. S., 251; *Matter of Baker*, 96 Fed. Rep., 954).

It is in the application of this principle that this Court determined that a judgment in favor of the State for penalties incurred through infraction of State laws was not effected by a bankruptcy proceeding to secure a discharge of the debts of the person against whom such judgment was recovered (*Re Abramson*, 210 Fed. Rep., 878; *Matter of Moore*, 111 Fed. Rep., 145).

As applied to the instant case, section 64a, of the bankruptcy act in express words directs taxes due to a State to be paid in advance of the payment of dividends to creditors without reference as to whether such taxes are liens upon the property of the bankrupt.

The sovereign prerogative being recognized in bankruptcy cases, where the distribution of insolvent estates is wholly of statutory regulation, a Court of Equity which, through its receiver, administers a debtor's assets in accordance with the chancery practice of England, not incompatible with American institutions, should recognize a right which the Courts of the State affected have held exists in all its force and vigor.

It has therefore been correctly determined that the right of the State to preference in the payment of any debt due it is not effected through the property of the debtor being in the hands of a receiver for administration. As *BOURQUIN, J.*, said in *American Bonding Co. vs. Reynolds*, 203 Fed. Rep., 356, 358:

"This law of priority is not that of the ancient common law with all its rigorous methods of enforcement, but is that of the

modified common law as it was when adopted by Montana. The right thereof can be exercised as long as the debtor's title to the property out of which it sought to make the public debt is not divested. And this is true whether the property is levied upon and seized in the debtor's possession, or is in *custodia legis* when the priority is asserted. See *Middlesex Freeholders' Case*, 29 N. J. Eq., 268.

* * * A court of chancery receiver does not take title to the property involved, but only possession as an officer of the court, and to dispose thereof as the court directs. * * *

When a Court of Chancery takes possession of property by its receiver, it is familiar law the owner's title is not divested, and in administration thereof the laws of priorities and preferences govern in the payment of debts."

The rule stated in the quotation above was recognized by this Court in *Pennsylvania Steel Co. vs. New York City Railways Co.*, 193 Fed. Rep., 721, Mr. Justice NOYES, stating, page 728:

"A chancery receiver is an indifferent person appointed by the Court to hold property in litigation pending suit. He is a ministerial officer with the function of a custodian. * * * Being a mere holder, his appointment does not change the title to the property in his charge, nor alter any lien of contract."

The above doctrine is likewise pertinently stated in *Greeley vs. Provident Savings Bank*, 98 Mo., 458, 460, as follows:

"It may be conceded that the State did not have an express lien upon the assets that went into the hands of the receiver, but had a right paramount to other creditors to be paid out of those assets; a right which it could have enforced through its revenue officers by the summary process of distress, but for the fact that the property and assets of its debtor had passed in the custody of its courts, whose duty it was, in the administration and distribution of those assets, to respect that paramount right upon the untrammelled exercise upon which depends the power to protect the very fund being distributed and to maintain the expense of the tribunal engaged in the distributing of it, and to make no order for the distribution of assets in *custodia legis* except in subordination of that right."

The Federal Courts, sitting as courts of admiralty, recognize the principle that no jurisdiction will be exercised over a sovereign, either local or foreign, or over instrumentalities employed by it in the public service. The non-exercise of the power of the Court in such cases is by reason of a due regard for the dignity and independence of the right of sovereignty (The Roseric, 254 Fed. Rep., 154).

Equal regard to state sovereignty, with its consequent rights and prerogatives, should be accorded in a Court of Equity in applying the same basic principles, particularly in respect to a claim for taxes where the position of the State is above that of a party having ordinary business dealings with another.

Cook County National Bank vs. United States, 107 U. S., 445, if in any manner controlling, is founded upon the principle underlying the determination in Guarantee Title & Trust Co. vs. Title Guaranty & Surety Co., 224 U. S., 152, which the Court of Appeals of the State of New York noted in Matter of Carnegie Trust Co., 206 N. Y., 390, 399, and which the Appellate Division of the New York Supreme Court more fully expressed in Matter of Neiderstein, 154 App. Div., 238, 246, that the changes in the various bankruptcy statutes of the United States indicated a change in the legislative purpose in relation to preferences which affected claims of the United States. Nothing in such determination can affect the status of the claim of the State of New York in the instant case.

The right of the State to a preference in the payment of its demands was construed by the Courts of the State of New York not as a rule of practice in the administration of estates of insolvents but as a prerogative right of the State as successor of the English crown, as declared in *Giles vs. Grover*, 9 Bingham, 128, as follows:

"It is perfectly clear that at common law the king has very peculiar prerogatives much beyond the common right of a subject for the recovery of his debts. Of these (not to mention others which are not to the present purpose) one was that where one was indebted to the king and likewise to other persons, the king's debt was to be preferred in payment, that is, the king was to be paid before any other creditor of the party, and consequently

to be preferred in an execution, Mad. Exch., 183, Chap. C 23, s. 7. The general rule is, and this has been acknowledged in all cases that where the right of the king and that of his subjects concurred, that of the king shall prevail."

The nature of the sovereign right of preference is well stated in *State vs. Rowse*, 49 Mo., 586, 592, as follows:

"The claim of the State may be likened to an equitable lien—one that is not actual and will follow the property into the hands of a *bona fide* purchaser for value, but still a *quasi* lien that attaches to the property until it encounters a higher equity."

Upon this doctrine is predicated the decision in *Commonwealth vs. McMillen*, 1 Ky. Law. Rep., 270, in holding that the claims of the State were not affected by the bankruptcy law of the United States, as Congress had neither express nor implied power by tax or exemption to burden the instruments of the State government, or free the citizens of the State from the operation of the constitutional means exercised by the State in execution of its reserved powers.

See in accord, *Seay vs. Bank of Rome*, 66 Ga., 609; *Robinson vs. Bank of Darien*, 18 Ga., 65; *Booth vs. State of Georgia*, 134 Ga., 163; *Oren vs. Wrightson*, 51 Md., 34; *State Bank of Maryland*, 6 Gill. and J., 205; *Minnesota vs. Bell*, 64 Minn., 400; *State of Minnesota vs. Northern Trust Co.*, 70 Minn., 393; *Greeley vs. Provident Savings Bank*,

98 Mo., 459; Insurance Commissioner vs. Commercial Mutual Insurance Co., 20 R. I., 7; State vs. Sheldon, 46 Ct., 400; U. S. Fidelity Co. vs. Rainey, 113 S. W. Tell., 397; State vs. Bruie, 102 Pac., 831; Bent vs. Hobbardson, 138 Mass., 99; State vs. Thum, 6 Idaho, 323; State vs. Midland Bank, 52 Neb., 1; State vs. Foster, 5 Wyo., 199; Myers vs. Bd. of Education, 51 Kan., 87; Ind. Dist. vs. King, 80 Iowa, 497; Flow Works vs. Lamp, 80 Iowa, 722.

The New York State decisions are summarized in the following quotation from *In re Atlas Iron Construction Co.*, 19 App. Div., 415:

"The interest subsequently acquired by the creditor was subject to the prior right of the State; and when the property, in virtue of local process, comes to be in *custodia legis*, it is the duty of the Court to respect this priority of right in the application of the funds of the insolvent corporation."

The taxes in the instant case represent obligations of a public character, the result of the arbitrary act of the State for the enhancement of the public revenue (*People ex rel Hatch vs. Beardon*, 184 N. Y., 431, affirmed 204 U. S., 152).

The nature of the tax is the same as that in *Wise vs. The Wise Company*, 153 N. Y., 507, where the right of preference of the State was recognized but held not to be operative to displace prior specific liens obtained by creditors, an exception recognized in *Matter of Carnegie Trust Company*, *supra*.

This Court in administering through its receiver the assets of the All Package Grocery Stores Com-

pany must have due regard to the rights of preferred creditors as they are fixed by law.

In *Conklin vs. United States Shipbuilding Company*, 148 Fed. Rep., 129, the Court allowed to the State of New Jersey preference in the payment of a franchise tax. It is true that in that case there was a statute in the State of New Jersey that such a tax should be a preferred debt in case of insolvency. But in the instant case the absence of such a statute is supplemented by judicial decisions of the State of New York of like import and effect, and the law is established as if such a statute creating the preference existed.

The creditors of the All Package Grocery Stores Company are presumed to deal with said corporation with knowledge that the corporation had received the privilege and franchise of carrying on business within the State of New York and to enhance its assets through such right in return for which the corporation obligated itself to pay a tax to the State of New York, which said tax in the event of insolvency was a preferred debt. As the Court stated in *Conklin vs. U. S. Ship'lding Company*, *supra*:

"Called on as this Court now is to instruct its receiver as to his duty concerning the claim of the State of New Jersey, it cannot impair the State's contractual right. If such a rule is a hard one for the general creditors of insolvent corporations, it can be changed only by legislative action. The receiver is instructed that it is his duty to pay the tax."

In like manner the receiver in the instant case should ~~have~~ been instructed to pay the franchise taxes due to the State of New York and the order appealed from ~~should be modified by~~ this Court to provide accordingly (N. Y. Terminal Co. vs. Gaus, 204 N. Y., 512).

The instance cited in the opinion of Mr. Justice Hand of the Court of New York State attempting to adjudicate a claim of sovereign priority of the State of California is not apropos, for the reason that in this instant case the claim for priority is asserted against the property of the insolvent corporation located within the jurisdiction of the creditor State. In respect to this property the State possessed the summary right of seizure in satisfaction of its demand. Such property was impressed with an equitable lien in favor of the State. When such property, thus circumscribed, is judicially removed from the State control into the custody of a Federal Court for administration, the right of the sovereign State should not, and will not, be prejudiced thereby. No other foreign Court could administer this property except with the State's consent, through a receiver, ancillary or otherwise appointed in the Courts of the State in whose favor the several claims for taxes accrue. There could not, therefore, be any conflict between two sovereign States in respect to property to which only one State can claim a tax demand. The claim attaches to the property, irrespective of the domicile of the debtor corporation.

III.

The sovereignty of the State attaches to property within its territory available for the satisfaction of its demands.

If the All-Package Grocery Stores Company were being liquidated by a tribunal of the State of New York, there would be no question but that the *quasi* lien attaching to all property subject to the State Court for administration would insure the payment of the state's demand in full. The rule is academic that liquidation by a federal court does not operate to displace any equities that attach to property passing into the hands of a federal receiver for administration. The same recognition will be accorded to liens or quasi liens as would attach were the property administered by a State tribunal.

The mistaken conception of Point I of the Petitioner's Brief lies in the fact that it fails to recognize that the prerogative of the state attaches not against the individual but against property that is in the hands of an officer of the Court for distribution. Out of such property, the prerogative entitles the State to preferential payment as against all creditors, except those having prior specific liens. Consideration of such prerogative right, therefore, does not rest upon the residence of the debtor but upon the situs of property available for the satisfaction of existing indebtedness. In the instant case such property is within the

jurisdiction of the State of New York and is subject to the right of the state attaching thereto.

IV.

The license fees representing the basis of the demand of the State of New York were legally assessed.

Under the Statute of the State of New York the tax has been assessed upon the amount of capital employed by the foreign corporation in the State of New York. The statute requires the submission of reports of the amount of such capital. The tax is thereupon fixed by the state officials. The statute provides for a State Board of Tax Commissioners in which is vested the power to ascertain the capital actually employed in the State of New York and the proper fixing of the tax due. With this state machinery provided, it must be assumed in this proceeding that the tax was fixed upon the basis of the capital of the defendant corporation actually employed within the State of New York. The tax was fixed upon the amount reported without objection upon the part of the defendant company. The report to the state must have been of material benefit to the defendant company in the extension of its business and the securing of credit.

Under these circumstances, the receiver cannot suggest that the amount of the tax was not fairly and properly determined upon the report submitted by the defendant company.

V.

A lien attached to the assets of the defendant company for the payment of the license tax.

In Point II of the Petitioner's Brief, the petitioner again fails to properly state the nature of the state's right. The lien of the state, created through its prerogative right, is independent of the provisions of the Tax Law and have no relation thereto. The Tax Law merely creates the indebtedness; the securing of the payment of said indebtedness rests on the principle of the Common Law adopted as part of the jurisprudence of the state.

VI.

The decision of the Circuit Court of Appeals is not in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit.

State of Alabama vs. Martin, 256 Fed. Rep., 313, cited in Point III of Petitioner's Brief is, upon analysis, an authority in support of the respondent.

The State of Alabama did not adopt the principles of state preference nor judicially recognize the priority of the state in the payment of its demands. In liquidation proceedings in the Federal Courts, said Courts followed the decisions of

Alabama in this respect and refused to give the demands of the State of Alabama preference solely upon the consideration that the courts of Alabama themselves did not recognize the existence of the priority claimed. As WALKER, C. J. stated (256 Fed. Rep., 313, 314) :

"So far as we are advised, the priority claimed in the instant case has never been judicially recognized in Alabama. In view of that circumstance, and of the statutory provision above referred to, we think the conclusion is warranted that the priority claimed does not exist under the law of that state."

In the instant case, the priority claimed has been judicially recognized in the State of New York. Under these circumstances effect will be given thereto by the federal courts.

VII.

No necessity exists for the granting of the writ of certiorari.

An application of similar character has heretofore been presented to this court by the People of the State of New York, petitioners, against the Central Trust Company of New York, The Third Avenue Railroad Company, New York City Railways Company and others, respondents (No. 706 October Term, 1911).

In this case, decided prior to the decision of the Court of Appeals of the State of New York in *Matter of Carnegie Trust Company*, the Circuit Court of Appeals for the Second Circuit then determined that the state right of preference had not been recognized by the decisions of the State of New York. The state filed a petition for a writ of certiorari to review said decision. The granting of said writ was opposed on behalf of the respondents therein, primarily upon the theory that the case involved solely an interpretation of the decisions of the State of New York which did not warrant a review of the determination of the Circuit Court of Appeals by this Court. The application for the writ of certiorari was denied.

Subsequent to this decision, the Court of Appeals of the State of New York decided the question in *Matter of Carnegie Trust Company*, and the principles of that case have since been announced in various adjudications of the State of New York, so that at this time there is no doubt as to what the courts of the State of New York hold in respect to the question at issue. The same reasons that prompted the decision of this Court in *People of the State of New York vs. The Central Trust Company* are apropos to the determination of this case and require that the present application be denied.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition of H. Snowden Marshall, as receiver of All-Package Grocery Stores Company, for a writ of certiorari should be denied.

Dated New York, March 29th, 1920.

CORTLANDT A. JOHNSON,
Deputy Attorney General of the
State of New York,
Of Counsel for the Respondent,
The People of the State of New York.

APPENDIX.

**UNITED STATES CIRCUIT COURT OF
APPEALS,**

FOR THE SECOND CIRCUIT.

WILLIAM S. SWEET, JR.,
Plaintiff,

against

**ALL PACKAGE GROCERY STORES
COMPANY,**
Defendant.

E. 14-389.

In the Matter

of

**The Petition of the People of the
State of New York,
Petitioners-Appellants.**

Before—WARD, ROGERS and HOUGH, Circuit Judges.

**GILBERT & GILBERT, for Appellee; A. S.
GILBERT and FRANCIS GILBERT, of
Counsel.**

**CHARLES D. NEWTON, Attorney General,
for The People; ROBERT P. BEYER, of
Counsel.**

WARD, Circuit Judge:

The State of New York has presented in this equity receivership claims against the All Package Grocery Stores Company, a corporation of the State of New Jersey, as follows:

"For license fees or taxes stated against All Package Grocery Stores Company, a New Jersey corporation, the predecessor of defendant, for the privilege of exercising its corporate franchises and carrying on business within the State of New York based on the amount of capital stock employed in New York State, \$977.86.

For license fee or tax heretofore stated against the defendant for the privilege of exercising its corporate franchise and carrying on business within the State of New York, \$22,517.86."

Sec. 181 of the Tax Law of the State of New York was amended by Ch. 490 L. 1917, entitled, "An Act to amend the tax law in relation to the license tax on foreign corporations," the material provisions being:

"Sec. 181. License Tax on Foreign Corporations. Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this State, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one

per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; * * * The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collection of such license fees, as he now has with regard to domestic corporations."

The remedy which the Comptroller had to collect taxes from domestic corporations was provided by Sec. 201, the relevant part of which is as follows:

"Sec. 201. * * * the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the

state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof."

It is contended that this license fee is not a tax but a conventional agreement between the state and foreign corporations whereby they contract to pay a fee in consideration of the privilege of doing business in the State. But we think it quite clear that the license fee is a tax. It is provided for in the state tax law, described as a license tax in the title of the amending act, called a license tax in the description of Sec. 181 and is fixed by the State Tax Commission.

The Court of Appeals of New York in *Wise vs. Wise Co.*, 153 N. Y., 507, referring among other cases, to two earlier decisions of *In re Columbian Ins. Co.*, 3 Abb. Dec., 239, and *Central Trust Co. vs. N. Y. C. & N. R. R. Co.*, 110 N. Y., 250, said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims, though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives

of the British crown as parts of the common law suitable and applicable to our condition.

* * * The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or the trustee of an insolvent person, or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. * * *

In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases:

- (1) Where the preference is expressly given by statute as was the case in *U. S. vs. State Bank of North Carolina*, *supra* (6 Pet., 29, 34).
- (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the

proceedings for collection, as was the case in the Columbian Ins. Co. Receivership, 3 Abb. Dec., 239."

In *Robinson vs. Mutual Reserve Co.*, 175 Fed. Rep., 624, affirmed 189 Fed. Rep., 347, we held that the State was not entitled to any preference over general creditors on its claim for taxes when the statutory lien did not arise until after receivers had been appointed and no warrant or other legal process for collection had been issued before their appointment. This was in strict accordance with the test laid down in *Wise vs. Wise*, *supra*, as to the State's right of preference. In *Central Trust Co. vs. Third Avenue R. R. Co.*, 186 Fed. Rep., 293, though a lien was given for taxes which came into effect before the appointment of the receivers, we construed the statute as not giving the lien any preference over prior debts specifically secured by lien. Subsequently the Appellate Division of the First Department in *Matter of Carnegie Trust Co.*, 151 App. Div., 606, affirmed 206 N. Y., 290, decided that the State as sovereign is entitled to priority of payment for taxes and any other debts, whether such priority is given by statute or not, over unsecured creditors, just as the Crown was at common law.

In this case the District Judge held that this priority as confirmed by the highest Court of New York was a matter of procedure only. We think it was a matter of substantive right, being a part of the common law adopted by the State Constitution of 1777 as the law of the State of New York. Following this decision, therefore, we now hold that

the State's claim for license tax, though not given a lien by statute (except from the time of the actual levy of a warrant for collection issued by the Comptroller) is entitled to priority of payment over general creditors.

It is further contended that the prerogative of the State of New York does not exist as against the State of New Jersey, with which the State of New York is not in the relation of sovereign. But the State is a sovereign as to all persons and things within its own boundaries and as to the property of the defendant corporation in the hands of the receivers here the prerogative clearly exists.

Decree reversed.

UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND CIRCUIT.

WILLIAM S. SWEET, Jr.,
Plaintiff,

against

ALL PACKAGE GROCERY STORES
COMPANY,
Defendant.

In the Matter

of

The Petition of the PEOPLE OF
THE STATE OF NEW YORK,
Petitioners-Appellants.

HOUGH, C. J. (dissenting) :

The majority decision does not enforce a specific lien securing either a tax or any other demand; it does recognize a right in the State of New York to preference and priority in the payment of debts over other creditors,—by virtue of its sovereignty.

Sovereignty over what? Certainly not over the insolvent corporation, which is of another State, and not over this Court (as I suppose), but over the corporate property because it is physically situated in New York. In other words, when, as

here, the State has no lien affecting its debtor's *res*, its sovereignty is brought forward to operate in *rem*.

The doctrine, when not imposed by a modern statute, is a trifle archaic,—yet perhaps well enough in a court of New York, which is subject in *personam* (so to speak) to the same sovereignty. But, so far as New York is concerned, the property of the All Package Company might just as well be in the custody of a court of California,—or of Canada, as where it is.

Goods in custodia the District Court of the United States cannot be reached by any process of the State in which that Court is sitting; legally they are as remote as if in foreign parts, and the physical situation could only affect legal rights, if the legal custodian were bound by foreign law; in this instance, the law of New York. In matters such as this, it is not so bound by either comity, statute or constitutional obligation. The majority judgment can only rest on a belief that the Court is affected by the sovereignty aforesaid. This I deny, and therefore dissent.

Office Supreme Court, U.
FILED

JUN 1 1920

JAMES J. BAKER,
CLERK

No.

294

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of the ALL
PACKAGE GROCERY STORES CO., Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

**MOTION BY THE PETITIONER TO ADVANCE AND
PLACE ON SUMMARY DOCKET.**



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Re-
ceiver of the ALL PACKAGE
GROCERY STORES CO.,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF
NEW YORK.

No. 836.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

**MOTION BY THE PETITIONER TO ADVANCE
AND PLACE ON SUMMARY DOCKET.**

Comes now H. Snowden Marshall, as receiver,
etc., the petitioner, by his counsel, and respectfully
moves that the above-entitled cause be advanced
and placed on the summary docket of this Court.

Petitioner was appointed receiver of the All Package Grocery Stores Company (a Delaware corporation) by the United States District Court for the Southern District of New York in a consolidated stockholders' and creditors' suit in equity to conserve the assets of the corporation.

Among the creditors of the corporation was the State of New York, which presented to the receiver a claim (1) for \$843.58 for annual franchise taxes due by the said Delaware corporation as well as by its predecessor (a New Jersey corporation of the same name) on the capital actually employed by said corporations in the State of New York; and (2) for \$23,515.72 for license fees due by such corporations for the privilege of exercising their corporate franchises in the State of New York. In the State's claim it was asserted that the said amounts became a lien on all the property of the Delaware corporation pursuant to the provisions of the New York Tax Law prior to the appointment of the receiver.

Under the New York Tax Law annual franchise taxes become a lien upon property of a corporation from the time they are payable, but license fees do not become a lien unless a warrant has been issued for their collection, and then only from the time an actual levy is made. No warrant was ever issued for the collection of the license fees in question.

The claim was heard by United States District Judge Augustus N. Hand, who upheld the right of the State to a lien in respect of the annual franchise taxes because a lien therefor was imposed by the Tax Law and he granted priority of payment thereof upon that ground. He denied the right of

the State to the lien in respect of the license fees because no lien therefor had been acquired under the statute at the time of the appointment of the receiver and he allowed the sum of \$23,515.72, due for license fees to be proved only as a general claim.

The State of New York appealed to the Circuit Court of Appeals for the Second Circuit from so much of Judge Hand's order as disallowed its claim for a lien in respect of license fees. In that Court the State of New York claimed a right of preference in payment of the license fees by reason of its sovereign prerogative and the Circuit Court of Appeals, by a divided court, upheld the claim for preference on that ground.

The Delaware corporation is hopelessly insolvent; it has several hundred creditors whose claims have been allowed and payment of a further dividend thereon is dependent upon the determination of the question involved. This question is also invested with a public character by reason of the nature of the right asserted by the State and the extent to which such right is controlling upon the Federal Courts.

The case is not one requiring extended argument and petitioner therefore requests that it be advanced and placed on the summary docket.

Counsel for the State of New York concurs in this request for advancement.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

May, 1920.

Office Supreme Court, U. S.
FILED

SEP 18 1920

JAMES D. MAHER,
CLERK.

No. 294.

In the Supreme Court of the United States,

OCTOBER TERM, 1920.

H. SNOWDEN MARSHALL, as Receiver of All Package
Grocery Stores Company,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

*Certiorari to the United States Circuit Court of Appeals
for the Second Circuit.*

BRIEF ON BEHALF OF PETITIONER.

A. S. GILBERT,
FRANCIS GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

1881

1882

INDEX.

	Page.
STATEMENT OF THE CASE	1-5
QUESTIONS PRESENTED	5-6
ARGUMENT	6-21
The State's Change of Theory	6-7
The State did not acquire any lien in respect of the License fees before the assets passed into the hands of the Receivers	7-10
The Decision of the New York courts in Matter of Carnegie Trust Company is not controlling upon the question here involved	10-13
The question is one in which the Federal court was free to exercise its inde- pendent judgment	13-14
As the District Court and the court be- low were bound to exercise and give effect to their own judgment, it be- came the duty of the court below to follow the decision of this court in the City of Richmond vs. Bird, 249 U. S., 174	14-16
The sovereign Prerogative of the State did not extend to the assets in the hands of the Receiver	16-21
CONCLUSION	21-22

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1920.

H. SNOWDEN MARSHALL, as Re-
ceiver of the ALL PACKAGE
GROCERY STORES Co.,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF
NEW YORK.

No. 294.

*Certiorari to the United States Circuit Court of
Appeals for the Second Circuit.*

BRIEF ON BEHALF OF THE PETITIONER.

STATEMENT OF THE CASE.

This proceeding brings up for review a decree of the Circuit Court of Appeals for the Second Circuit, reversing an order of Hon. Augustus N. Hand, United States District Judge for the Southern District of New York, in a consolidated equity

cause pending in that Court, entitled, William L. Sweet, Jr. against All Package Grocery Stores Company. Judge Hand disallowed the claim of the State of New York to a lien upon the assets of a foreign corporation in the hands of a Federal receiver in equity, for the amount due said State by the corporation as a license fee for the privilege of doing business therein, no lien having been acquired by the State under any statute.

The All Package Grocery Stores Company (the defendant in the consolidated equity cause) was incorporated in 1915 under the laws of Delaware, with an authorized capital of \$25,000,000, for the purpose of conducting a chain of retail grocery stores. It succeeded to all the assets of a corporation of the same name, incorporated under the laws of New Jersey with an authorized capital of \$1,000,000, which had theretofore carried on a business of the character described in the State of New York.

The New Jersey corporation became indebted to the State of New York for a *license fee* of \$977.86 for the privilege of exercising its corporate franchise therein. It also became indebted for an *annual franchise tax* of \$259.70 on the capital actually employed by it in that State in 1915.

Thereafter the Delaware corporation carried on the business in New York and became indebted to the State of New York for a license fee of \$22,517.85 for the privilege of exercising its corporate franchise therein. It also become indebted for an *annual franchise tax* of \$441.99 based on the capital actually employed by it in that State in 1916.

In November and December, 1917, stockholders and creditors, respectively, residents and citizens of New York, filed bills in equity in the United

States District Court for the Southern District of New York against the Delaware corporation, for the appointment of a Receiver to conserve its assets. H. Snowden Marshall, the petitioner herein, and Herbert A. Emerson (since resigned) were appointed Receivers and the suits proceeded as a consolidated cause entitled, William L. Sweet, Jr. against All Package Grocery Stores Company, as hereinbefore stated.

In said consolidated cause Judge Hand made an order limiting the time of creditors to file claims against the defendant corporation and appointed a Special Master to pass upon any claims objected to by the Receiver. After the expiration of the time so limited, the State of New York presented to the District Court a petition (Record, pp. 6-7) for leave to file a claim against the estate of the Delaware corporation in the hands of the Receiver for the *license fees* owing by the New Jersey and Delaware corporations, amounting in the aggregate to the sum of \$23,515.72, and for the *annual franchise taxes* owing by said corporations, which with interest and penalty amounted to \$843.58. In the claim it was asserted "that said taxes accrued and became a lien on all of the property of defendant corporation pursuant to the provisions of the Tax Law of the State of New York* prior to the appointment of a Receiver herein."

*The relevant sections of the New York Tax Law, viz., Sections 181, 182, 197 and 201, are printed as an appendix.

Under Section 197 of the New York Tax Law annual franchise taxes become a lien upon and bind all the real and personal property of a corporation from the time when they are payable, but under Section 201 of that Law license fees do not become a lien on the property of a corporation unless a warrant of the State Comptroller has been issued to the Sheriff for the collection thereof, and then only from the time an actual levy is made thereunder. No warrant was ever issued for the collection of the license fees in question.

On the hearing of the State's petition, Judge Hand disposed of the controversy upon the merits without referring it to the Special Master, by an order (Record, pp. 14-15) in which he directed payment of the amount due for *annual franchise taxes* as preferred claims, and disallowed the claim for preference as to the amount due for *license fees*, allowing them only as general claims against the estate.

He upheld the right of the State to a lien in respect to the *annual franchise taxes* upon the ground that a lien therefor was imposed by Section 197 before the assets passed into the hands of a Receiver. He denied the right of the State to a lien in respect to the *license fees* upon the ground that the Comptroller not having issued his warrant for the collection thereof, no lien had been acquired under the statute (Opinion, Record, pp. 16-18).

The State appealed to the Circuit Court of Appeals from that part of Judge Hand's order which disallowed the claim for preference (Notice of Appeal, Record, p. 3; Assignment of Errors, Record, p. 4).

In the Circuit Court of Appeals the State of New York abandoned the contention set up in its original claim, that the amount became a lien pursuant to the provisions of the Tax Law, and instead claimed a right to preference by reason of its sovereign prerogative.

The Circuit Court of Appeals, by a divided court, upheld the State's claim of sovereign prerogative, Judge Ward writing the prevailing opinion (Record, pp. 20-22), which was concurred in by Judge Rogers, Judge Hough writing a dissenting opinion (Record, p. 23). The Court below, in departing from the rule which theretofore obtained in that

circuit, felt itself controlled by the decision in *Matter of Carnegie Trust Co.* (151 App. Div., 606; affirmed 206 N. Y., 290) which, Judge Ward said, "decided that the State as sovereign is entitled to priority of payment for taxes and any other debts, whether such priority is given by statute or not, over unsecured creditors, just as the Crown was at the common law." The order of the District Court was accordingly reversed by the decree of the Circuit Court of Appeals (Record, p. 24), which is now under review.

Petitioner appealed to the Circuit Court of Appeals for a re-hearing upon the ground that there had not been called to the Court's attention, and the Court had not considered the opinion of this Court in *City of Richmond vs. Bird* (249 U. S., 174), which opinion was not published at the time petitioner's brief was written, and which opinion petitioner deemed controlling upon the question raised in the Court below (Record, pp. 24-25). The petition for rehearing was denied (Record, p. 26) whereupon petitioner applied to this Court for a writ of *certiorari*, which application was granted and the writ issued (Record, p. 27).

QUESTIONS PRESENTED.

1. Has the State of New York, upon the sole ground of sovereign prerogative, a lien upon the property of a foreign corporation, for a license fee charged by the State for the privilege of doing business therein when the State fails in the performance of conditions precedent on the part of the State, required by its statutes in order to secure such lien, and the property is under the exclusive jurisdiction of the Federal Courts in an equity suit?

2. Was the Circuit Court of Appeals, in deciding the foregoing question, bound by the decision of the New York Court of Appeals in *Matter of Carnegie Trust Company* (206 N. Y., 290), or by the decision of this Court in *City of Richmond vs. Bird* (249 U. S., 174)?

3. Was the State of New York precluded from asserting for the first time on appeal its claim for a preference upon the sole ground of sovereign prerogative, having based its claim in the District Court upon the statutory lien only?

ARGUMENT.

It should be noted at the outset that the State of New York is now attempting to sustain its claim upon a theory entirely different from that relied upon in the District Court.

When the State of New York presented to the District Court the original petition embodying its claim it asserted "that said taxes accrued and became a lien on all the property of the defendant corporation pursuant to provisions of the Tax Law of the State of New York prior to the appointment of a receiver herein." There was no hint or suggestion that the State relied, or at any stage of the proceedings intended to rely, on any other theory. The State, realizing that its claim could not be sustained on the theory of a statutory lien, abandoned that theory in the court below, and relied entirely upon its sovereign prerogative under the common law, and the Court below upheld the claim on this theory alone.

We submit that the orderly administration of justice requires that a litigant instituting a pro-

ceeding expressly stated to be based upon a statutory right, as was the case here, should be held to that theory throughout the prosecution of the proceeding, and should not, without proper amendment of the petition or pleadings, be permitted to recover upon a right based solely upon the common law. Rules that apply to ordinary litigants apply with equal force to the United States and the State of New York. When the State of New York voluntarily submitted to the jurisdiction of the District Court, it placed itself on an equal footing with other litigants. This we deem established under the principles stated and authorities cited in *United States vs. Ingate*, 48 Fed., 251.

THE STATE DID NOT ACQUIRE ANY LIEN IN RESPECT OF THE LICENSE FEES BEFORE THE ASSETS PASSED INTO THE HANDS OF THE RECEIVERS.

We submit that it is axiomatic that a tax law must provide the method for its enforcement and for the collection of the tax.

As stated in *Cooley on Taxation* (Vol. 2, p. 863) :

"The general rule is that taxes are not a lien unless expressly made so (19 Wall., 656; 102 U. S., 472), and when liens are expressly created they are not to be enlarged by construction (U. S. vs. Pacific R. R. Co., 4 Dill., 71)."

In *Merricether vs. Garrett*, 102 U. S., 472, the Court, in discussing the character of taxes, said:

"Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are impositions levied for the support

of the government, or for some special purpose authorized by it. The consent of the tax payer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states, and we believe in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *Augusta vs. North*, 57 Me., 392; *Camden vs. Allen*, 2 Dutch., 398; *Perry vs. Washburn*, 20 Cal., 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. *In neither case are the taxes liens upon property unless made so by statute. Philadelphia vs. Greble*, 38 Pa., 339; *Howell vs. Philadelphia*, 38 Pa., 471; 2 Dillon, Mun. Corp., sec. 659. *Levied only by authority of the Legislature, they can be altered, postponed or released at its pleasure.*"¹

Petitioner concedes the right of the State to a lien in respect to the annual franchise taxes. Those taxes are imposed under Section 182 of the New York Tax Law, and their collection is provided for in Section 197, which provides for the payment of various franchise taxes and penalties for failure to pay the same when due. It is significant, however, that this section does not contain any provision for the payment of license fees or any penalty for fail-

¹Italics throughout the brief and appendix are our own unless otherwise stated.

ure to pay the same. The first sentence of Section 197¹ provides that the annual franchise taxes on foreign corporations shall be due and payable before the 15th day of January in each year, and the last sentence² provides that the tax shall be a lien upon and bind all the real and personal property of a corporation from the time when it is payable until the same is paid in full.

The only provision for the collection of license fees is contained in Section 201, under authority of which the Comptroller may issue his warrant to the Sheriff for the collection of such license fee, and such warrant when issued shall be a lien upon and bind all the real and personal property of a corporation from the time the actual levy is made thereon.³

No warrant was ever issued for the collection of the license fees in question, either before or after the assets passed into the hands of the receiver. That the State did not, therefore, acquire any lien upon said assets in respect of the license fees was assumed by the Court below, for in its opinion upholding a lien on the ground of sovereign prerogative, Judge WARD said (Record, p. 22) :

"We now hold that the state's claim for a license tax, *though not given a lien by statute* (except from the time of the actual levy of a warrant for collection by the Comptroller) is entitled to priority of payment over general creditors.."

With the appointment of the receivers, therefore, the assets of the corporation, although physically

¹See appendix, page 27.

²See appendix, page 28.

³See appendix, page 29.

within the territory limits of the State of New York, passed out of the jurisdiction of the officers and Courts of that State into the jurisdiction of the Federal Courts, free from any lien except that in respect to the annual franchise taxes. Under such circumstances the State of New York was limited to such remedies, if any, for the collection of its taxes that it might have, by reason of comity, in the courts of other jurisdictions.

THE DECISION OF THE NEW YORK COURTS IN MATTER OF CARNEGIE TRUST COMPANY IS NOT CONTROLLING UPON THE QUESTION HERE INVOLVED.

THE COURT BELOW MISCONCEIVED THE DECISION IN THAT CASE.

The attitude of the Court below in respect to the right of the State in the absence of a statutory lien, prior to the *Carnegie Trust Company* case, is illustrated by the following extract from Judge WARD's opinion (Record, p. 22) :

"In *Robinson vs. Mutual Reserve Co.*, 175 Fed. Rep., 624, affirmed 189 Fed. Rep., 347, we held that the State was not entitled to any preference over general creditors on its claim for taxes when the statutory lien did not arise until after receivers had been appointed and no warrant or other legal process for collection had been issued before their appointment. This was in strict accordance with the test laid down in *Wise vs. Wise*, *supra*, as to the State's right of preference. In *Central Trust Co. vs. Third Avenue R. R. Co.*, 186 Fed. Rep., 293, though a lien was given for taxes which

came into effect before the appointment of the receivers, we construed the statute as not giving the lien any preference over prior debts specifically secured by lien."

The influence of the *Carnegie Trust Company* case on the Court below is shown by Judge WARD'S interpretation of it as follows:

"Subsequently the Appellate Division of the First Department in *Matter of Carnegie Trust Co.*, 151 App. Div., 606, affirmed 206 N. Y., 290, *decided that the State as sovereign is entitled to priority of payment for taxes and any other debts, whether such priority is given by statute or not, over unsecured creditors, just as the Crown was at common law.*"

An analysis of the *Carnegie Trust Company* case will demonstrate quite unmistakably that it was not there "decided that the State as sovereign is entitled to priority of payment for taxes." The *Carnegie Trust Co.* was a banking institution organized under the laws of New York. It was a creature of that State, owing to it all its powers as well as its very existence. The relation between it and the State was that of subject and sovereign, so far as it is possible for that relation to exist under our form of government. The sovereign state deposited with the subject Trust Company canal funds belonging to the State. The Trust Company failed. The State demanded its money and claimed a preference and priority over other depositors by virtue of its sovereign prerogative. Its right to preference and priority was disputed. The opin-

ion of the Appellate Division defined the matter in controversy as follows:

"This appeal presents a single question, whether or not the State, being a depositor and not a creditor of the insolvent bank or trust company, is entitled to preference in payment over unsecured creditors."

It will be seen that that was not a tax case. No question of taxes was involved, directly or indirectly. There was, therefore, no *decision* in that case construing the sections of the New York Tax Law hereinbefore referred to, or any other taxing statutes.

The remarks of Justice Scott, who wrote the opinion in the Appellate Division, as to the sovereign prerogative of the State in respect of taxes referred, as the context ~~the~~ the opinion shows, to cases in which there existed the relation of sovereign and subject. His general expressions regarding taxes like "general expressions in every opinion are to be taken in connection with the case in which those expressions are used,"¹ namely, a case between sovereign and subject. The question now before this Court was not investigated or considered in the *Carnegie Trust Company* case, consequently there was "no application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties"² now under consideration. Insofar therefore as the remarks of Mr. Justice Scott attempted to define the rights of the

¹Cohens vs. Virginia, 19 U. S., 264, 399.

²Carroll vs. Carroll, 57 Id., 275, 286.

State in a situation similar to the instant case, they are dicta pure and simple.

Pollock vs. Farmers Loan & Trust Co.,
157 U. S., 429, 574.

THE QUESTION IS ONE IN WHICH THE FEDERAL COURT
WAS FREE TO EXERCISE ITS INDEPENDENT JUDG-
MENT.

In no sense can the decision in the *Matter of Carnegie Trust Company* be regarded as a construction of the New York Tax Law in general, or Sections 181 and 201 in particular; nor can that decision be regarded as in any sense foreclosing a consideration of the question here involved. The decision in the *Carnegie Trust Company* case was based upon and built around a set of facts involving the rights of the State of New York against one of its own creatures, and was instinct with the idea of sovereignty, which necessarily implies a relation between a sovereign and subject. It did not define or attempt to define the rights, if any, which the State of New York might have against the property beyond the jurisdiction of its officers and courts, and belonging to the subject of another and equally sovereign state. There having been no decision by the New York Court upon the particular question here involved, it became not only the right but the duty of the Federal Court to exercise its own judgment in the premises.

The question as to the binding force of State Court decisions received very full consideration in *Burgess vs. Seligman*, 107 U. S., 20, and the doctrine thus announced received the unqualified approval of this Court in *Kuhn vs. Fairmount Coal*

Co., 215 U. S., 349, where Mr. Justice HARLAN made the following observation, particularly applicable to the instant case:

"The court took care, in *Burgess vs. Seligman*, to say that the Federal Court would not only fail in its duty, but would defeat the object for which the national courts were given jurisdiction of controversies between citizens of different states, if, while leaning to an agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications."

AS THE DISTRICT COURT AND THE COURT BELOW WERE BOUND TO EXERCISE AND GIVE EFFECT TO THEIR OWN JUDGMENT, IT BECAME THE DUTY OF THE COURT BELOW TO FOLLOW THE DECISION OF THIS COURT IN THE CITY OF RICHMOND VS. BIRD, 249 U. S., 174.¹

That matter arose out of a bankruptcy proceeding in Virginia, where the common law prevails to the same extent as in the State of New York.² In

¹The City of Richmond vs. Bird was decided by this Court after the decision in the instant case by Judge Hand in the District Court and before the decision by the Circuit Court of Appeals. It was not, however, called to the attention of the Court below until after the decision herein when it was then made the basis of an application for rehearing.

²Virginia Constitution of 1870—Schedule:

"That no inconvenience may arise from the changes in the Constitution of this State and in order to carry the same into complete operation, it is hereby declared that—

Sec. 1. The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the Legislature."

that case this Court approved the doctrine laid down in *Jackson Coal Co. vs. Phillips Line*, 114 Va., 40, where it was held that the State of Virginia having by its statutes fixed the method for the collection of the tax and the condition not having been complied with on the part of the State, the latter was in no better position than a general creditor where the property of a corporation passed into the hands of a receiver. That is precisely the situation in the instant case. The Comptroller of the State of New York might have issued his warrant to the Sheriff for the collection of the license fee in question, and the Sheriff might have made an actual levy under the warrant before the property passed into the hands of the receivers, whereupon a lien would have accrued. This, however, was not done. The State took no proceedings whatever to enforce the collection of a license fee and the property passed into hands of the receivers free of any lien under the statute.

In *State of Alabama vs. Martin*, 256 Fed., 313, the Circuit Court of Appeals for the Fifth Circuit held that the claim of the State of Alabama against a bankrupt corporation for the hire of convicts was not entitled to priority of payment, notwithstanding the fact that the common law of England prevailed in that State, to the same extent that it does in the State of New York. In the course of its opinion, the Court said:

"The Common Law of England so far as not inconsistent with the Constitution Laws and institutions of Alabama prevails in that State.
 * * * It is claimed that the State had the priority which the Common Law accorded to debts owing to the sovereign. There are Alabama statutes the enactment and existence

of which seems to us to be inconsistent with the hypothesis that the priority claim exists under the law of that State."

The Court then enumerates several classes of debts of decedent's estates, which have priority over taxes. In other words, the Court held that the State of Alabama had by its own statutes waived any claim to priority which it might have asserted on the ground of its sovereign prerogative. An analogous situation exists in the instant case. As pointed out, the State of New York might have made the license a lien as soon as it became due, just as it made corporation taxes generally a lien, but when it expressly postponed the accruing of the lien it waived any claim it might possibly have asserted on the ground of its sovereign prerogative. If this is not so, then the language of Section 201 is meaningless surplusage.

THE SOVEREIGN PREROGATIVE OF THE STATE DID NOT EXTEND TO THE ASSETS IN THE HANDS OF THE RECEIVER.

The State has claimed its right to priority of payment by reason of its sovereignty, but, as Judge Hough, in his dissenting opinion, said:

"Sovereignty over what? Certainly not over the insolvent corporation, which is of another State, and not over this Court (as I suppose), but over the corporate property because it is physically situated in New York. In other words, when, as here, the State has no lien affecting its debtor's *res*, its sovereignty is brought forward to operate *in rem*."

There can only be sovereignty by reason of the citizenship of the subject or situs of property within the domain of the sovereign. It is clear that the corporation was not a subject of the State of New York, but was a subject of the sovereign State of Delaware which gave it birth. Nor was the property within the domain of the sovereign, even though located within the City of New York and elsewhere within the State of New York. It was as much beyond the jurisdiction of the State of New York as though physically located in Maine or California.

It is indisputable that by the Constitution of 1777 (Section 35) the State of New York adopted "such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the Colony of New York, as together did form the law of said Colony on the 19th day of April, in the year of our Lord 1775," and that such powers were continued under the Constitution of 1894, except as limited by Article 1, Section 16, which provided that "all such parts of the common law and such of the said acts or parts thereof as are repugnant to this Constitution are hereby abrogated."

In *Matter of Carnegie Trust Company*, 206 N. Y., 290, the New York Court of Appeals said:

"Under the Constitution we have no king. The king, therefore, and the prerogatives that were personal to him being repugnant to our Constitution, are abrogated. But its sovereignty, powers, functions and duties in so far as they pertain to civil government, now devolve upon the people of the State. * * *"

It will not be disputed, we think, that such sovereign prerogatives of the king as were taken over

by the State of New York and devolved upon the people of the State, are now exercised by the people through the instrumentality of their state legislature. Thus there resides in the legislature the power to modify, suspend, or waive any of such sovereign prerogatives, for as was said by the New York Court of Appeals in *Fulton Light, Heat & Power Co. vs. State of New York*, 200 N. Y., 400-412:

"In adopting the common law of England the people of this State took over such of its rules as were applicable to and consistent with their condition and circumstances. It became and is the law of the State and the basis of its jurisprudence, except so far as its principles and rules of action have been modified by constitution, *statutes* or usages; or were inapplicable to our Constitution."

In the exercise of the power and authority vested in it, the legislature has from time to time impaired, waived or diminished the sovereign prerogative of the State in respect to the collection of its taxes and debts due the State. This is illustrated in the application of the statute of limitations to claims in favor of the State for taxes. In *People vs. Roberts*, 157 N. Y., 70, wherein a corporation obtained a writ of certiorari to review the assessment of an annual franchise tax under the New York Tax Law, it was held that the claim of the State was barred by the statute of limitations, the Court saying:

"Turning to the Code of Civil Procedure we find that it provides that certain actions must be commenced within certain periods after a cause of action is created. When the cause of

action is to recover upon the liability created by a statute, the period of limitation is placed at six years, and where the action is to recover a penalty to the people of the State, within two years. It also provides that the limitations so prescribed 'apply alike to actions brought in the name of the people of the State or for their benefit and to actions by private persons'."

From the foregoing, we deduce the following conclusions:

1. That such prerogatives of the king of England as the State took over from the common law were vested in the people.

2. That the people in their sovereign capacity act through the legislature.

3. That the people so acting through the legislature possessed the power to and have actually impaired and diminished the sovereign prerogatives of the State.

4. That inasmuch as a tax law must provide for its enforcement and the collection of taxes, the legislature may further waive the State's sovereign prerogatives by suspending the lien or postponing the time of the collection of the tax.

5. That the legislature has in respect of the license fee due by a foreign corporation postponed the lien until the issue of the Comptroller's warrant and a levy by the Sheriff thereunder.

6. That by thus suspending the lien, the legislature has made it possible that the collection of the tax may be completely defeated through the

removal of the subject matter of the tax from the jurisdiction of the State's officers of the courts.

The possibility of such a situation has been recognized by a number of States. The Ohio Tax Law of 1911, applicable to foreign corporations, provides (Sec. 117): "The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all the property of the corporation, whether such property is employed by the corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof."¹

By provisions of this kind various States have protected themselves against such a situation as confronts the State of New York in the instant case. The State of New York might have done likewise. It could have imposed upon foreign corporations, for the privilege of doing business therein, any condition which it saw fit. We are not now concerned with the reasons which prompted the legislature to differentiate between annual franchise taxes and license fees in respect to a lien therefor, by providing that in case of the annual franchise taxes a lien should attach immediately upon the tax becoming due, and in case of the license fee the lien should be postponed until the issue of the Comptroller's warrant and a levy thereunder. Nor are we concerned why the State failed to take such precautions for the collection of the license fee in the event that the property of the corporation should pass into the hands of an assignee, trustee, or receiver, as various other States have done. The fact is that no lien attached in

¹Substantially similar provisions taken from the laws of Arkansas, Nebraska, North Carolina, Pennsylvania and West Virginia are printed as an appendix.

respect to license fees before the property passed out of the jurisdiction of the officers of the Courts of the State and into the hands of the Federal receiver. The rights of the State of New York arising under the law which created the tax in question are not to be enlarged by construction. In support of this proposition, we invoke not only the general rule laid down by this Court in *Gould vs. Gould*, 245 U. S., 151, 153, but also the rule laid down by the New York Court of Appeals in *People vs. Miller*, 177 N. Y., 51, as applicable to its own taxing statutes, that,

"A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used and a well founded doubt as to the meaning of the act defeats the tax."

CONCLUSION.

In closing let us say that in these times when the subject of taxation assumes such an important part in the administration of the Federal and State governments, as well as in the economic affairs of the people; when the tendency is towards the discovery of new sources of revenue and the devising of new forms of taxation; or, when taxing authorities attempt, as they have in this case, to enlarge their powers by a reliance upon something outside of and beyond the taxing statutes, then the situation calls for a recurrence to those fundamental principles of taxation which form the

foundation of the rule so frequently announced by this Court that the provisions of taxing statutes should not be extended by implication beyond the clear import of the words used therein.¹

Respectfully submitted,

A. S. GILBERT,
FRANCIS GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

¹Gould vs. Gould (*supra*).

APPENDIX I.

EXTRACTS FROM NEW YORK STATE TAX LAW.

"Sec. 181. LICENSE TAX ON FOREIGN CORPORATIONS. *Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies, and building and loan associations, doing business in this State, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such*

license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collection of such license fees, as he now has with regard to domestic corporations. No action shall be maintained or recovery had in any of the Courts in this state by such foreign corporation after thirteen months from the time of beginning such business within the state, without obtaining a receipt from the comptroller for the payment of the license fee upon the capital stock employed by it within this state during the first year of carrying on its business in the state."

"Sec. 182. FRANCHISE TAX ON CORPORATIONS. *For the privilege of exercising its corporate franchises in this state every domestic corporation, joint stock company or association, and for the purpose of doing business in this state, every foreign corporation, joint stock company or association, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by*

such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets do not exceed the liabilities, exclusive of capital stock, or

(2) The average price at which such stock sold during said year did not equal or exceed its par value, or

(3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

(2) The average price at which such stock sold during said year is equal to or greater than the par value,

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock

employed in this state, but such valuation shall not be less than

- (1) The par value of such stock,
- (2) The difference between the assets and liabilities, exclusive of capital stock,
- (3) The average price at which such stock sold during said year.

If such corporation, joint stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereon, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

- (1) Upon which no dividend was made or declared, or

- (2) Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value,

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon each dollar of such capital stock at the average price at which said stock sold during the said year."

"Sec. 197. PAYMENT OF TAX AND PENALTIES FOR FAILURE. *A tax imposed by Section one hundred and eighty-two¹ or one hundred and eighty-six² of this chapter shall be due and payable into the state treasury on or before the fifteenth day of January in each year. A tax imposed by section one hundred and eighty-four of this chapter on a transportation or transmission corporation, or by section one hundred and eighty-five, on elevated railroads or surface railroads not operated by steam, shall be due and payable into the state treasury on or before the first day of August in each year. A tax imposed by section one hundred and eighty-seven of this chapter on an insurance corporation shall be due and payable into the state treasury on or before the first day of June in each year. A tax imposed by section one hundred and eighty-eight³, one hundred and eighty-eight-a⁴ or one hundred and eighty-nine⁵ shall be due and payable into the state treasury on or before the first day of September in each year. A tax imposed by section one*

¹Annual franchise tax on domestic and foreign corporation generally.

²Franchise tax on water-works companies, gas companies, electric or steam heating, lighting and power companies.

³Franchise tax on trust companies.

⁴Taxation of investment companies.

⁵Franchise tax on savings banks.

hundred and ninety-one of this chapter on a foreign banker shall be due and payable into the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax, and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make any special report required by the commission, within any reasonable time to be specified by the commission, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. *Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full."*

"Sec. 201. WARRANT FOR THE COLLECTION OF TAXES. After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed

to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. *Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof.* The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a Court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner."

**APPENDIX II.****STATUTORY PROVISIONS OF VARIOUS STATES REGARD-
ING LIENS FOR FEES, TAXES AND PENALTIES
OWING BY FOREIGN CORPORATIONS.¹****ARKANSAS.**

"The taxes and penalties required to be paid by the provisions of this act shall be the first lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business, or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors of stockholders thereof" (Castle's Digest, Sec. 6882n; K. & C. Sec. 8476; L. 1911, p. 67).

NEBRASKA.

"The fees, taxes and penalties required to be paid by this article shall be the first and best lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof" (R. S., Sec. 772).

NORTH CAROLINA.

"The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof" (Revenue Act, L. 1917, c. 231, Section 82, subsec. [12]).

¹Compiled from The Corporation Manual (36th Edition).

PENNSYLVANIA.

"All state taxes imposed under the authority of any law of this commonwealth now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, company, association, joint-stock association, or limited partnership, shall be a first lien upon the franchise and property, both real and personal, of such corporation, company, association, joint-stock association, or limited partnership, from the date when they are settled by the auditor general and approved by the state treasurer; and whenever the franchise or property of a corporation, company, association, joint-stock association, or limited partnership shall be sold at a judicial sale, all taxes, interests, bonus, penalties, and public accounts due the commonwealth, shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation, company, association, joint-stock association, or limited partnership" (L. 1911, p. 955, Sec. 1).

"The auditor general may at any time transmit to the prothonotaries of the respective counties of the commonwealth, to be by them entered of record, certified copies of all liens for state taxes, unpaid bonus, interest, and penalties, which may now exist or hereafter arise by virtue of any law of this commonwealth; upon which record it shall be lawful for writs of scire facias to issue, and be prosecuted to judgment and execution, in the same manner as such writs are ordinarily employed" (L. 1911, p. 955, Sec. 2).

WEST VIRGINIA.

"The amount of such tax shall be deemed a debt due the state, and shall be a lien on all the property and assets of the corporation prior to all other liens except the lien of the taxes levied on its property for state, county and district purposes. Such tax shall be a preferred debt in cases of insolvency" (Code, c. 32, Sec. 133; L. 1907, Special Session, c. 16; Sec. 133; H., Sec. 1266).

Office Supreme Court, U. S.
FILED

SEP 28 1920

JAMES D. BAKER,
CLERK.

No. 294.

In the Supreme Court of the United States,

OCTOBER TERM, 1920.

H. SNOWDEN MARSHALL, as Receiver of All Package
Grocery Stores Company,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

*Certiorari to the United States Circuit Court of Appeals
for the Second Circuit.*

BRIEF ON BEHALF OF THE RESPONDENTS.

CORTLAND A. JOHNSON,

ROBERT P. BETER,

Counsel for Respondents.



INDEX.

	Page.
STATEMENT OF THE CASE	1-2
ARGUMENT	2-3
The License Fees with respect to which preference was allowed were tax obli- gations	3-6
The State of New York is entitled to a preference in payment of the claim for taxes by reason of its sovereign pre- rogative	6-8
The right of preference of the State of New York is in the nature of a lien attaching to property within its terri- torial jurisdiction	8-10
The Federal Courts will recognize and enforce the State right of preference in respect to property formerly within the territorial limits of the State asserting said right	11-15
A liquidation by a Federal Court does not operate to displace any equities that attach to property passing into the hands of a Federal Receiver for administration. The same recognition will be accorded to liens or quasi liens as would attach were the property ad- ministered by a State tribunal	16
The decision of this Court in the <i>City of Richmond vs. Bird</i> , 249 U. S., 174, is not controlling	16-17
The position taken by the State of New York is not technical but in accord- ance with justice	18-19

AUTHORITIES CITED.

CASES.

	Page.
Heerwagen vs. Crosstown Street Ry. Co., 90 N. Y. App. Div., 275.....	3
Maine vs. Grand Trunk Railway Co., 142 U. S., 217	3
People ex rel. Elliott-Fisher Co. vs. Sohmer, 148 App. Div., 514	4-5
People ex rel. U. S. A. P. P. Co. vs. Knight, 174 N. Y., 475	5-6
Home Insurance Co. vs. New York, 134 U. S., 594...	5-6
Matter of Liquidation of Carnegie Trust Company, 151 N. Y. App. Div., 606.....	6-7
Matter of Niederstein, 154 N. Y. App. Div., 238....	8
Matter of Wesley, 156 N. Y. App. Div., 403.....	8
People vs. Metropolitan Surety Co., 158 App. Div., 647	8
Mixer vs. Mohawk Clothing Co., 155 N. Y. Supp., 647	8
Giles vs. Grover, 9 Bingham, 128.....	9
State vs. Rowse, 49 Mo., 586, 592.....	9
Commonwealth vs. McMillen, 1 Ky. Low. Rep., 270	9
Seay vs. Bank of Rome, 66 Ga., 609.....	10
Robinson vs. Bank of Darien, 18 Ga., 65.....	10
Booth vs. State of Georgia, 134 Ga., 163.....	10
Oren vs. Wrightson, 51 Md., 34.....	10
State Bank of Maryland, 6 Gill. and J., 205.....	10
Minnesota vs. Bell, 64 Minn., 400.....	10
State of Minnesota vs. Northern Trust Co., 70 Minn., 393	10
Greeley vs. Provident Savings Bank, 98 Mo., 459...	10
Insurance Commissioner vs. Commercial Mutual Insurance Co., 20 R. L., 7.....	10
State vs. Sheldon, 46 Ct., 400.....	10
U. S. Fidelity Co. vs. Rainey, 113 S. W. Tell., 397...	10
State vs. Brule, 102 Pac., 831.....	10
Bert vs. Hobbardson, 138 Mass., 99.....	10
State vs. Thum, 6 Idaho, 323.....	10
State vs. Midland Bank, 52 Neb., 1.....	10
State vs. Foster, 5 Wyo., 199.....	10
Myers vs. Board of Education, 51 Kan., 87.....	10
Ind. Dist. vs. King, 80 Iowa, 497.....	10
Plow Works vs. Lamp, 80 Iowa, 722.....	10
In re Atlas Iron Construction Co., 19 App. Div., 415	10
United States vs. Herron, 87 U. S., 251.....	11
Matter of Baker, 96 Fed. Rep., 954.....	11
Re Abramson, 210 Fed. Rep., 878.....	11
Matter of Moore, 111 Fed. Rep., 145.....	11

III

	Page.
American Bonding Co. vs. Reynolds, 203 Fed. Rep., 356, 358	12
Pennsylvania Steel Co. vs. New York City Railways Co., 193 Fed. Rep., 721.....	13
Greeley vs. Providence Savings Bank, 98 Mo., 458, 460	13
The Roseric, 254 Fed. Rep., 154.....	14
People ex rel. Hatch vs. Reardon, 184 N. Y., 431...	14
Wise vs. The Wise Company, 153 N. Y., 507.....	14-16
Conklin vs. United States Shipbuilding Company, 148 Fed. Rep., 129.....	14-15
N. Y. Terminal Co. vs. Gaus, 204 N. Y., 512.....	15
Alabama vs. Martin, 266 Fed. Rep., 313.....	17



IN THE
Supreme Court of the United States,
OCTOBER TERM, 1920.

H. SNOWDEN MARSHALL, as Re-
ceiver of the ALL PACKAGE
GROCERY STORES Co.,

Petitioner,

against

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondents.

No. 294.

*Certiorari to the United States Circuit Court of
Appeals for the Second Circuit.*

BRIEF ON BEHALF OF THE RESPONDENTS.

STATEMENT OF THE CASE.

This is a proceeding to review the determination of the United States Circuit Court of Appeals for the Second Circuit, holding that two claims filed on behalf of the State of New York in the sum of

\$977.86 and \$22,517.86 for license fees for the privilege of exercising corporate franchises and carrying on business in the State of New York, based upon the amount of capital employed in New York State, were preferred claims, payable as such by the petitioner out of the funds in his hands for administration as receiver of All Package Grocery Stores Company. The petitioner's brief contains under Appendix I the provisions of the New York State Tax Law, under which the claim arose. The Circuit Court of Appeals for the Second Circuit upheld the claim of the State of New York of sovereign prerogative, recognizing the right of preference thus created in Federal administration of property formerly within the territorial limits of the State of New York.

ARGUMENT.

The State of New York is not attempting to now sustain its claim upon a theory different from that relied upon in the District Court. Throughout this litigation the State has taken the position that its lien rested upon the theory of sovereignty; that the Tax Law of the State of New York created the indebtedness; that the securing of the payment of said indebtedness rested upon the principles of the common law adopted as part of the jurisprudence of the State, and that the State had never, through its Legislature, divested itself of said right. This was the contention of the State in the argument before the District Court. The same contention was urged by the State before the Circuit Court of Appeals, Second Circuit, where the contention of the State was sustained. This claim of pref-

erence must be incorporated as a rule of administration of the Tax Law of the State of New York is if expressly stated as a part of the statute. The urging of this principle in the construction of the statute giving birth to the claim is therefore in entire accord with the original position of the respondent taken upon the filing of the claim.

THE LICENSE FEES WITH RESPECT TO WHICH PREFERENCE WAS ALLOWED WERE TAX OBLIGATIONS.

In *Heerwagen vs. Crosstown Street Ry. Co.*, 90 N. Y. App. Div., 275, the Court construed a similar license fee as imposed upon foreign corporations under Section 181 of the Tax Law of the State of New York for the privilege of exercising their corporate franchise in the State of New York as a tax, stating, per SPRING, J., page 283:

"The tax which a stock corporation pays for the privilege of doing business is based upon its capital stock, and is the compensation which it pays for that privilege. It has the attribute of a tax as well as that of compensation. Whatever may be the condition imposed for the privilege of doing business—whether designated as a bonus, compensation, a license fee or in name a tax—it is in effect a tax. *Burroughs Tax*, Sec. 131; *Gordon vs. Appeal Tax Court*, 3 How. (U. S.), 133; *Home Insurance Co. vs. New York State*, 134 U. S., 594; *Chicago General Railway Co. vs. City of Chicago*, 176 Ill., 253."

The Appellate Division follows *Maine vs. Grand Trunk Railway Co.*, 142 U. S., 217, where the re-

quirement to pay an annual sum to the State of Maine imposed upon railway companies for the privilege of exercising their corporate franchise in that State was construed to be a tax.

Section 181 of the Tax Law received construction in *People ex rel. Elliott-Fisher Co. vs. Sohmer*, 148 App. Div., 514 (affirmed 206 N. Y., 634, on the opinion of the Court below), the Court, throughout its opinion, speaking of the State charge as a tax, KELLOGG, J., stated, page 515:

"This license *tax* first came into our law by Chapter 240 of the Laws of 1895, which was entitled 'An Act to provide for licensing foreign stock corporations.' It provided for such corporations then authorized to do business in this State a license fee of one-eighth of one per centum payable on December 1, 1895, 'to be computed upon the basis of the amount of capital stock employed by it within this State during the year preceding that date,' and for such corporations thereafter authorized to do business in this State it provided a like license fee payable before receiving the certificate of authority 'to be computed upon the basis of the capital stock employed by it within this State for its business during the first year of carrying on its business in this State.' The *tax* was to be paid at once. Chapter 143 of the Laws of 1886 imposed an organization tax of one-eighth of one per cent. upon the capital stock of a domestic corporation, and in the year 1895 the Comptroller in his report to the Legislature suggested that foreign corporations were required to pay no organization *tax* here, and, therefore, had an advantage over domestic corporations which was an in-

ducement to corporations to organize outside of the State to do business in the State, and he suggested that such corporations should have no advantage over domestic corporations, and referred to the fact that the last Legislature had passed an act which would compel foreign corporations to pay a tax similar to the organization tax of domestic corporations, but that the act was so defective that it was not suffered to become a law. It is evident by the passage of the statute in question immediately following the report, and from the nature of the act itself, that its purpose was to impose upon foreign corporations a tax similar to the organization tax required of domestic corporations."

In *People ex rel. U. S. A. P. P. Co. vs. Knight*, 174 N. Y., 475, the nature of organization taxes upon domestic corporations, to which the taxes in the instant case are assimilated, was considered, and the Court of Appeals held that such taxes, although in the nature of license fees for the right to assume corporate existence, were a part of the taxing system of the State of New York, and that it was a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenue of the State. "If the grantee accepts the boon it must assume the burden."

The tax in the instant case is analogous to that considered in *Home Insurance Co. vs. New York*, 134 U. S., 594, where the tax was construed as being on the corporate franchise or business of the company, and reference is only made to its capital stock and dividends for the purpose of de-

termining the amount of the tax, and it was held that no constitutional objections lies in the way of a Legislature prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.

In the Knight case, *supra*, the Court further held there was no distinction in the policy of the State of New York in taxing domestic and foreign corporations, stating, per VANN, J., page 484:

"In the instance of a foreign corporation it is not its franchise that is taxed, because it is not subject to the laws of this State, but it is that intangible property which rests solely in the privilege allowed it of exercising its franchise within the State, upon which the tax is levied."

This public nature of the obligation created under Section 181 of the Tax Law of the State of New York is recognized in all the opinions of the Courts below.

THE STATE OF NEW YORK IS ENTITLED TO A PREFERENCE IN PAYMENT OF THE CLAIM FOR TAXES BY REASON OF ITS SOVEREIGN PREROGATIVE.

The State of New York has adopted as a part of its jurisprudence the Common Law doctrine of state preference in the payment of demands due it. In the Matter of the Liquidation of the Carnegie Trust Company, 151 N. Y. App. Div., 606; 206 N. Y., 390, both the Appellate Division of the Supreme Court of the State of New York and the New York Court of Appeals held that all claims due to the state from an insolvent corporation, no matter of

what character, were preferred over all other unsecured creditors, as Mr. Justice SCOTT stated in 151 App. Div., 610:

"If the State, by virtue of its inherent prerogative right is entitled to a preference in the payment of taxes which are but debts due to the State created by the exercise of its arbitrary power, it is but a step to hold that it is entitled to a preference in the payment of other debts by virtue of the same prerogative right. And so it has generally been held in States which have adopted the common law of England (*Robinson vs. Bank of Darien*, 18 Ga., 165; *Seay vs. Bank of Rome*, 66 *id.*, 609; *Booth vs. State of Georgia*, 134 *id.*, 163; *State vs. Bank of Maryland*, 6 Gill & J., 205; *Oren vs. Wrightson*, 51 Md., 34; *State vs. Northern Trust Co.*, 70 Minn., 393; *State vs. Bell*, 64 *id.*, 400; *Ins. Comr. vs. Commercial Mutual Ins.*, 20 R. I., 7. See also 26 Am. & Eng. Ency. of law (second edition), 479, and cases cited."

In the Court of Appeals the authorities were fully reviewed in the affirming opinion of Mr. Justice HAIGHT, who thus summarized its determination (206 N. Y., 399):

"We thus find our Court fully committed upon the question under discussion, and we entertain no doubt as to the wisdom of now adopting it."

The only limitation upon the sovereign prerogative right of preference pertains to prior specific liens obtained by creditors.

In the able opinion in *Matter of Niederstein*, 154 N. Y. App. Div., 238, the sovereign right of preference was applied in the liquidation of estates of decedents, the Court holding that the common law doctrine that debts due the sovereign were preferred over other debts of the same class was incorporated as part of the jurisprudence of the State, and that this prerogative right had never been abrogated or affected in any manner.

In *Matter of Wesley*, 156 N. Y. App. Div., 403, the sovereign right of preference was recognized and applied to the claim of the State for maintenance of an incompetent, this result being in harmony with the laws of the State and its Constitution making the claims of the State preferred over other creditors of an insolvent.

In *People vs. Metropolitan Surety Co.*, 158 App. Div., 647, a franchise tax levied against a corporation for the privilege of doing business in the State of New York was held entitled to a preference, upon the authority of the cases cited. The same ruling was made in relation to a personal property tax claim against a corporation in liquidation (*Mixer vs. Mohawk Clothing Co.*, 155 N. Y. Supp., 647).

THE RIGHT OF PREFERENCE OF THE STATE OF NEW YORK IS IN THE NATURE OF A LIEN ATTACHING TO PROPERTY WITHIN ITS TERRITORIAL JURISDICTION.

The right of the State to a preference in the payment of its demands was construed by the Courts of the State of New York not as a rule of practice in the administration of estates of insolvents, but as a prerogative right of the State

as successor of the English crown, as declared in *Giles vs. Grover*, 9 Bingham, 128, as follows:

"It is perfectly clear that at common law the king has very peculiar prerogatives much beyond the common right of a subject for the recovery of his debts. Of these (not to mention others which are not to the present purpose) one was that where one was indebted to the king and likewise to other persons, the king's debt was to be preferred in payment, that is, the king was to be paid before any other creditor of the party, and consequently, to be preferred in an execution, *Mad. Exch.*, 183, Chap. C 23, s. 7. The general rule is, and this has been acknowledged in all cases that where the right of the king and that of his subjects concurred, that of the king shall prevail."

The nature of the sovereign right of preference is well stated in *State vs. Rowse*, 49 Mo., 586, 592, as follows:

"The claim of the State may be likened to an equitable lien—one that is not actual and will follow the property into the hands of a *bona fide* purchaser for value, but still a quasi lien that attaches to the property until it encounters a higher equity."

Upon this doctrine is predicated the decision in *Commonwealth vs. McMillen*, 1 Ky. Low. Rep., 270, in holding that the claims of the State were not affected by the bankruptcy law of the United States, as Congress had neither express nor implied power by tax or exemption to burden the instruments of the State government, or free the citizens

of the State from the operation of the constitutional means exercised by the State in execution of its reserved powers.

See in accord, *Seay vs. Bank of Rome*, 66 Ga., 609; *Robinson vs. Bank of Darien*, 18 Ga., 65; *Booth vs. State of Georgia*, 134 Ga., 163; *Oren vs. Wrightson*, 51 Md., 34; *State Bank of Maryland*, 6 Gill. and J., 295; *Minnesota vs. Bell*, 64 Minn., 400; *State of Minnesota vs. Northern Trust Co.*, 70 Minn., 393; *Greeley vs. Provident Savings Bank*, 98 Mo., 459; *Insurance Commissioner vs. Commercial Mutual Insurance Co.*, 20 Ill. L., 7; *State vs. Sheldon*, 46 Ct., 400; *U. S. Fidelity Co. vs. Rainey*, 113 S. W. Tell., 397; *State vs. Bruie*, 102 Pac., 831; *Bent vs. Hobbarthson*, 138 Mass., 99; *State vs. Thum*, 6 Idaho, 323; *State vs. Midland Bank*, 52 Neb., 1; *State vs. Foster*, 5 Wyo., 199; *Myers vs. Bd. of Education*, 51 Kan., 87; *Ind. Dist. vs. King*, 80 Iowa, 497; *Plow Works vs. Lamp*, 80 Iowa, 722.

The New York State decisions are summarized in the following quotation from *In re Atlas Iron Construction Co.*, 19 App. Div., 415:

"The interest subsequently acquired by the creditor was subject to the prior right of the State; and when the property, in virtue of local process, comes to be in *custodia legis*, it is the duty of the Court to respect this priority of right in the application of the funds of the insolvent corporation."

THE FEDERAL COURTS WILL RECOGNIZE AND ENFORCE THE STATE RIGHT OF PREFERENCE IN RESPECT TO PROPERTY FORMERLY WITHIN THE TERRITORIAL LIMITS OF THE STATE, ASSERTING SAID RIGHT.

The Bankruptcy Law of the United States has been construed as not affecting the sovereign prerogative of either the National government or that possessed by any of the individual States. This is the result of the firmly established principle, engrafted in our jurisprudence of adoption from the common law of England—a principle which is recognized in its fullest extent in the State of New York—that as a result of any general statute, whereby any prerogative, right, title or interest is sought to be taken from either the Federal or any State government, neither is bound, unless the statute is given this extended application by express words (*United States vs. Herron*, 87 U. S., 251; *Matter of Baker*, 96 Fed. Rep., 954).

It is in the application of this principle that this Court determined that a judgment in favor of the State for penalties incurred through infraction of State Laws was not affected by a bankruptcy proceeding to secure a discharge of the debts of the person against whom such judgment was recovered (*Re Abramson*, 210 Fed. Rep., 878; *Matter of Moore*, 111 Fed. Rep., 145).

As applied to the instant case, section 64a of the Bankruptcy Act in express words directs taxes due to a State to be paid in advance of the payment of dividends to creditors without reference as to whether such taxes are liens upon the property of the bankrupt.

The sovereign prerogative being recognized in bankruptcy cases, where the distribution of insolvent estates is wholly of statutory regulation, a Court of Equity which, through its receiver, administers a debtor's assets in accordance with the chancery practice of England, not incompatible with American institutions, should recognize a right which the Courts of the State affected have held exists in all its force and vigor.

It has therefore been correctly determined that the right of the State to preference in the payment of any debt due it is not affected through the property of the debtor being in the hands of a receiver for administration. As *BOURQUIN, J.*, said in *American Bonding Co. vs. Reynolds*, 203 Fed. Rep., 356, 358:

"This law of priority is not that of the ancient common law with all its rigorous methods of enforcement, but is that of the modified common law as it was when adopted by Montana. The right thereof can be exercised as long as the debtor's title to the property out of which is sought to make the public debt is not divested. And this is true whether the property is levied upon and seized in the debtor's possession, or is in *custodia legis* when the priority is asserted. See *Middlesex Freeholders' Case*, 29 N. J. Eq., 268. * * *

A court of chancery receiver does not take title to the property involved, but only possession as an officer of the court, and to dispose thereof as the court directs. * * *

When a Court of Chancery takes possession of property by its receiver, it is familiar law the owner's title is not divested, and in adminis-

tration thereof the laws of priorities and preferences govern in the payment of debts."

The rule stated in the quotation above was recognized by this Court in *Pennsylvania Steel Co. vs. New York City Railways Co.*, 193 Fed. Rep., 721, Mr. Justice NOYES stating, page 728:

"A chancery receiver is an indifferent person appointed by the Court to hold property in litigation pending suit. He is a ministerial officer with the function of a custodian. * * * Being a mere holder, his appointment does not change the title to the property in his charge, nor alter any lien of contract."

The above doctrine is likewise pertinently stated in *Greeley vs. Providence Savings Bank*, 98 Mo., 458, 460, as follows:

"It may be conceded that the State did not have an express lien upon the assets that went into the hands of the receiver, but had a right paramount to other creditors to be paid out of those assets; a right which it could have enforced through its revenue officers by the summary process of distress, but for the fact that the property and assets of its debtor had passed in the custody of its courts, whose duty it was, in the administration and distribution of those assets, to respect that paramount right upon the untrammelled exercise upon which depends the power to protect the very fund being distributed and to maintain the expense of the tribunal engaged in the distributing of it, and to make no order for the distribution of assets in *custodia legis* except in subordination of that right."

The Federal Courts, sitting as courts of admiralty, recognize the principle that no jurisdiction will be exercised over a sovereign, either local or foreign, or over instrumentalities employed by it in the public service. The non-exercise of the power of the Court in such cases is by reason of a due regard for the dignity and independence of the right of sovereignty (*The Roseric*, 254 Fed. Rep., 154).

Equal regard to state sovereignty, with its consequent rights and prerogatives, should be accorded in a Court of Equity in applying the same basic principles, particularly in respect to a claim for taxes where the position of the State is above that of a party having ordinary business dealings with another.

The taxes in the instant case represent obligations of a public character, the result of the arbitrary act of the State for the enhancement of the public revenue (*People ex rel. Hatch vs. Reardon*, 184 N. Y., 431, affirmed 204 U. S., 152).

The nature of the tax is the same as that in *Wise vs. The Wise Company*, 153 N. Y., 507, where the right of preference of the State was recognized but held not to be operative to displace prior specific liens obtained by creditors, an exception recognized in *Matter of Carnegie Trust Company*, *supra*.

This Court in administering through its receiver the assets of the All Package Grocery Stores Company must have due regard to the rights of preferred creditors as they are fixed by law.

In *Conklin vs. United States Shipbuilding Company*, 148 Fed. Rep., 129, the Court allowed to the State of New Jersey preference in the payment of a franchise tax. It is true that in that case there was a statute in the State of New Jersey that such a tax should be a preferred debt in case of insolv-

ency. But in the instant case the absence of such a statute is supplemented by judicial decisions of the State of New York of like import and effect, and the law is established as if such a statute creating the preference existed.

The creditors of the All Package Grocery Stores Company are presumed to deal with said corporation with knowledge that the corporation had received the privilege and franchise of carrying on business within the State of New York and to enhance its assets through such right in return for which the corporation obligated itself to pay a tax to the State of New York, which said tax in the event of insolvency was a preferred debt. As the Court stated in *Conklin vs. U. S. Shipbuilding Company, supra*:

"Called on as this Court now is to instruct its receiver as to his duty concerning the claim of the State of New Jersey, it cannot impair the State's contractual right. If such a rule is a hard one for the general creditors of insolvent corporations, it can be changed only by legislative action. The receiver is instructed that it is his duty to pay the tax."

In like manner the receiver in the instant case has been properly instructed to pay the franchise taxes due to the State of New York (*N. Y. Terminal Co. vs. Gaus*, 204 N. Y., 512).

A LIQUIDATION BY A FEDERAL COURT DOES NOT OPERATE TO DISPLACE ANY EQUITIES THAT ATTACH TO PROPERTY PASSING INTO THE HANDS OF A FEDERAL RECEIVER FOR ADMINISTRATION. THE SAME RECOGNITION WILL BE ACCORDED TO LIENS OR QUASI LIENS AS WOULD ATTACH WERE THE PROPERTY ADMINISTERED BY A STATE TRIBUNAL.

The entire brief of the petitioner is based upon the erroneous failure to recognize that the prerogative of the State attaches not against the individual but against property that is within the territorial limits of the State. As to such property, the prerogative entitles the State to preferential payment as to all creditors except those having prior specific liens. Consideration of such prerogative right therefore does not rest upon the residence of the debtor, but upon the situs of the property available for the satisfaction of existing indebtedness. In the instant case, such property is within the jurisdiction of the State of New York and is subject to the right of the State attaching thereto.

THE DECISION OF THIS COURT IN THE CITY OF RICHMOND VS. BIRD, 249 U. S., 174, IS NOT CONTROLLING.

In the authority cited, the claim of the City of Richmond for taxes was not preferred by statute. It was held by this Court that the City's claim was subordinate to a valid lien protected by Bankruptcy Act, Sec. 67d, (Comp. St. Sec. 9,648). The decision is wholly in accord with the determination of the Court of Appeals in *Wise vs. The Wise Co.*, 153 N. Y., 507, cited in the Matter of Carnegie

TRUST Company, limiting the sovereign right of preference as not affecting prior specific liens obtained by creditors. As stated by Mr. Justice McREYNOLDS of this Court in the authority first quoted:

"And as the local laws gave no superior right to the city's unsecured claim for taxes, we are unable to conclude that Congress intended by Section 64a to place it ahead of valid lienholders."

The case can further be distinguished in that the common law right of preference is not involved. This common law priority was never recognized in the State of Virginia, and forms no part of the jurisprudence of that State. The case is in this respect in accord with *State of Alabama vs. Martin*, 266 Fed. Rep., 313, in which WALKER, C. J., stated, p. 314:

"So far as we are advised, the priority claimed in the instant case has never been judicially recognized in Alabama. In view of that circumstance, and of the statutory provision above referred to, we think the conclusion is warranted that the priority claimed does not exist under the law of that State."

In the instant case, the priority claimed has been judicially recognized in the State of New York. Its existence is independent of statutory provision. The case relied upon by the petitioner is therefore not controlling.

From the foregoing, we deduce the following conclusions:

1. That the State of New York, in adopting the principles of the common law, took over from the

common law those prerogatives attaching to the British crown which gave the King preference in the payment of any indebtedness due to the State.

2. That the right of preference, being part of the sovereign prerogative of the State, is not affected by legislation unless waived in express terms. A negative waiver will not be implied.

3. That the right of preference of the State of New York attaches to property within its territorial limits.

4. That when property within State territorial limits passes into Federal custody, the lien of the State will be preserved and given effect.

5. That the defects in the statute noted in the petitioner's brief operate prejudicially to the State in that it is possible for other liens to attach to which the prerogative right of the State would be junior; also the physical removal of the property out of the territorial limits of the State may defeat said preference. Said possible results, however, cannot militate against the State in a case where these circumstances do not exist.

CONCLUSION.

**THE POSITION TAKEN BY THE STATE OF NEW YORK
IS NOT TECHNICAL BUT IN ACCORDANCE WITH
JUSTICE.**

In receiving from the State the privilege of doing business within its territorial limits the All Package Grocery Stores Company has undoubtedly secured to itself the benefits flowing from such license. Its property has been enhanced and ren-

dered available for business in the State of New York. The creditors of the All Package Grocery Stores Company cannot in justice complain that this legitimate indebtedness, incidental to and an integral part of the right to do business, should be paid in full. The exercise of the authority to do business has undoubtedly, in great measure, produced the funds available for distribution to the creditors. The position of the State of New York is therefore not only in accordance with the final adjudications of the courts of that State, but in accordance with a just distribution of corporate funds to be made in this case which will appeal to the conscience of this Court.

Respectfully submitted,

CORTLAND A. JOHNSON,
ROBERT P. BEYER,
Counsel for Respondents.

**MARSHALL, AS RECEIVER OF ALL PACKAGE
GROCERY STORES COMPANY, v. PEOPLE OF
THE STATE OF NEW YORK.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

No. 294. Submitted October 12, 1930.—Decided December 30, 1930.

1. At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due to it, whether the property was in possession of the debtor or of a third person, or in *custodia legis*; and the priority could be defeated or postponed only through passing the title to such property, absolutely or by way of lien, before the sovereign sought to enforce his right. P. 382.
2. A like right of priority, based on sovereign prerogative, belongs to the State of New York, as her highest court has decided, through her adoption, by her constitutions, of the common law, and attaches to a debt due the State by a sister-state corporation as a license fee or tax for the privilege of doing business in New York, although no statute of the State makes the tax a lien or declares its priority. P. 383.
3. The question whether this priority is a prerogative right or a rule of administration is a question of local law, the determination of which by the highest court of the State concludes the federal courts. P. 384.
4. The priority extends to all property of the debtor within the borders

380.

Opinion of the Court.

of the State, whether the debtor be a resident or a non-resident, and is enforceable against such property in the hands of a receiver appointed by a federal court within the State, since such a receiver takes property subject to all liens, priorities or privileges existing or accruing under the state laws. P. 385. *City of Richmond v. Bird*, 249 U. S. 174, distinguished.

382 Fed. Rep. 727, affirmed.

THE case is stated in the opinion.

Mr. A. S. Gilbert, Mr. Francis Gilbert and Mr. William J. Hughes for petitioner.

Mr. Corliss A. Johnson and Mr. Robert P. Beyer for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On December 4, 1917, the District Court of the United States for the Southern District of New York appointed H. Snowden Marshall general receiver of the property of the All Package Grocery Stores Company, a corporation organized under the laws of Delaware, but having a place of business and property in the State of New York. The latter State asked to have certain debts due to it declared payable as preferred claims out of the assets in the hands of the receiver. These debts consisted of (a) amounts due for annual franchise taxes assessed under § 182 of the New York Tax Law, and (b) amounts due for license fees or taxes for the privilege of doing business within the State, assessed under § 181 of that law and payable but once. The State asserted in its claim "that said taxes accrued and became a lien on all the property of the defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of the receiver herein." The District Court held that both

classes of claims were taxes, but that the lien created by § 197 of the Tax Law applied only to annual franchise taxes and that no provision of the law gave a lien for license taxes until a levy was made therefor. It accordingly allowed the preference as to the amounts due for annual franchise taxes and denied it as to the amounts due for license taxes. Upon appeal by the State, the Circuit Court of Appeals held that, independently of specific statutory provision, the law of New York as declared by its courts gave to the State as sovereign a lien or priority for payment of taxes over unsecured creditors; that this priority was a prerogative right, not a mere rule of administration; and that it applied, therefore, in the federal courts, 262 Fed. Rep. 727. The case came here on writ of certiorari, 252 U. S. 577. The propriety of allowing to the State a preference as to amounts due for the annual franchise taxes is admitted by the receiver. No question of the relative priority of the State and the United States is involved. Nor does any question arise as to priority of the State over incumbrances. The single question is presented whether the State of New York has priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state legislature or otherwise.

At common law the crown of Great Britain, by virtue of a prerogative right, had priority over all subjects for the payment out of a debtor's property of all debts due it. The priority was effective alike whether the property remained in the hands of the debtor, or had been placed in the possession of a third person, or was in *custodia legis*. The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right. *Giles v. Grover*, 9 Bing. 128, 139, 157, 183; *In re Henley & Co.*, 9 Ch. D. 400. Compare *United States v.*

380.

Opinion of the Court.

National Surety Co., decided by this court November 8, 1920, ante, 73. The first constitution of the State of New York (adopted in 1777) provided that the common law of England, which together with the statutes constituted the law of the Colony on April 19, 1775, should be and continue the law of the State, subject to such alterations as its legislature might thereafter make. This provision was embodied, in substance, in the later constitutions. The courts of New York decided that, by virtue of this constitutional provision, the State, as sovereign, succeeded to the crown's prerogative right of priority; and that the priority was not limited to amounts due for taxes, but extended alike to all debts due to the State, *e. g.*, to amounts due on a general deposit of state funds in a bank. *Matter of Carnegie Trust Co.* 151 App. Div. (N. Y.) 606; 206 N. Y. 300. This priority has been enforced by the courts of New York under a great variety of circumstances in an unbroken series of cases extending over more than half a century.¹ It has been enforced as a right and not as a rule of administration.

This priority arose and exists independently of any statute. The legislature has never, in terms, limited its scope; and the courts have rejected as unsound every contention made that some statute before them for construction had, by implication, effected a repeal or abridgment of the priority.² The only changes of the right made by statute have been by way of enlarging its scope in

¹ See in addition to cases cited in the text: *Matter of Receivership of Columbian Insurance Co.*, 3 Abb. N. Y. Ct. App. Dec. 230, 242 [1866]; *Central Trust Co. v. New York City & Northern R. R. Co.*, 110 N. Y. 250, 259 [1886]; *Matter of Atlas Iron Construction Co.*, 19 App. Div. (N. Y.) 415, 419 [1897]; *Matter of Niedenstein*, 154 App. Div. (N. Y.) 228, 246 [1912]; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405 [1912]; *People v. Metropolitan Surety Co.*, 156 App. Div. (N. Y.) 647, 650 [1912]; *Winter v. Mohawk Clothing Co., Inc.*, 155 N. Y. S. 647 [1912].

² See *Matter of Niedenstein*, 154 App. Div. (N. Y.) 228, 244-6; *Matter of Wesley*, 156 App. Div. (N. Y.) 403, 405.

v. *David C. Beggs Co.*, 171 Fed. Rep. 157; *Coy v. Title Guarantee & Trust Co.*, 212 Fed. Rep. 520, 523; 220 Fed. Rep. 90. The right of priority has been likened to an equitable lien. *State v. Rowse*, *supra*. The analogous preference in payment given to claims for labor by state statutes, and to which the Bankruptcy Act gives priority, have been described as being "tantamount" to a lien. *In re Laird*, 109 Fed. Rep. 550, 555; *In re Bennett*, 153 Fed. Rep. 673, 677. The priority is a lien in the broad sense of that term which includes "those preferred or privileged claims given by statute or by admiralty law." 2 Bouvier Law Dict. (15th ed., 1883) 88. The prerogative right of the State resembles the privilege accorded by the civil law of Louisiana to certain classes of debts which it was assumed in *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127, would be enforced against property in the custody of a receiver appointed by a federal court. The fact that the right rests on the common law independently of any statute, does not, of course, affect the right of enforcement in the federal courts.

City of Richmond v. Bird, 249 U. S. 174, relied upon by the petitioner is not in point. The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right since neither the laws of the United States nor those of Virginia accorded such priority. Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York.

Affirmed.